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TRANSCRIPT OF RECORD

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FILED
JUN 8 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1952

No. [redacted]109

RALPH G. LEMKE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—6-5-53

No. 13342

United States
Court of Appeals
for the Ninth Circuit

RALPH G. LEMKE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the District Court for the District of Alaska,
Fourth Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

EVERETT W. HEPP,

Box 111, Fairbanks, Alaska,

Attorney for Plaintiff and Appellee.

JULIEN A. HURLEY,

Box 1043, Fairbanks, Alaska,

Attorney for Defendant and Appellant.

In the District Court for the District of Alaska
Fourth Judicial Division

No. 1578-Cr.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RALPH G. LEMKE,

Defendant.

INDICTMENT

The Grand Jury charges:

That on or about the 10th day of October, 1951, in the Fourth Judicial Division, Territory of Alaska, Ralph G. Lemke feloniously attempted to obtain from the Civilian Mess at Ladd Air Force Base, Alaska, money, by false token and with intent to defraud, in that the said Ralph G. Lemke, as the authorized agent of the said Civilian Mess, signed and presented for payment in the ordinary course of business, receipts for $60.00 in value of merchandise, which receipts constituted an authorization to the seller, Paul Elbert, for payment of money in the amount set forth thereon, which said merchandise was known by the said Ralph G. Lemke not to have been received by the said Civilian Mess, it being prearranged that said $60.00 when paid would be divided, $20.00 to the said Paul Elbert and $40.00 to the said Ralph G. Lemke, contrary to the provisions of Section 65-5-81, Alaska Compiled Laws Annotated, 1949.

Dated at Fairbanks, Alaska, this 7th day of January, 1952.

A True Bill.

/s/ [Illegible], Foreman.

/s/ EVERETT W. HEPP,
United States Attorney.

Witnesses before the Grand Jury: Paul Eibert, Conrad Lewis. [1*]

[Endorsed]: Filed January 7, 1952.

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes Now, the defendant above named, by his attorney, Julien A. Hurley, and respectfully moves the Court for an order to dismiss the Indictment on file herein for the reason that said Indictment does not state facts sufficient to constitute a crime. That there is nothing in the Indictment that alleges that the defendant or any other person made any attempt to secure money from the Civilian Mess at Ladd Field Air Force Base, or any person authorized to represent said Civilian Mess.

/s/ JULIEN A. HURLEY,
Attorney for Defendant. [3]

Acknowledgment of Service attached.

[Endorsed]: Filed Feb. 19, 1952.

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* Page numbering appearing at foot of page of original Transcript of Record.

[Title of District Court and Cause.]

ORDER, PLEA AND SETTING FOR TRIAL

The Government was represented by Everett W. Hepp, U. S. Attorney; the defendant was present in person and represented by Julien A. Hurley.

Respective counsel had argument on the defendant's Motion to dismiss the Indictment.

It was Ordered that the motion be denied.

Mr. Hurley stated that the defendant was ready to enter his Plea to the Indictment.

Upon being asked if he was Guilty or Not Guilty of the crime charged in the Indictment, to wit: Obtaining Money under False Pretenses, the defendant pled Not Guilty and the trial of this cause was set for 10:00 a.m., Tuesday, February 26, 1952.

* * * * *

Entered in Court Journal: No. 43, Page 80. Feb. 19, 1952. [4]

[Title of District Court and Cause.]

VERDICT No. 2

We, the jury duly empaneled and sworn to try the above-entitled cause, do from the law and the evidence therein find the defendant, Ralph G. Lemke, guilty of the crime of attempting to obtain money by false token with intent to defraud as set forth in the Indictment herein.

Done at Fairbanks, Alaska, this 27th day of February, 1952.

/s/ JEWELL BOSWELL,
Foreman.

Entered in Court Journal: No. 43, Page 93. Feb. 27, 1952. [5]

[Endorsed]: Filed Feb. 27, 1952.

In the District Court for the District of Alaska
Fourth Judicial Division

No. 1578-Cr.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

RALPH G. LEMKE,
Defendant.

JUDGMENT AND COMMITMENT

On this 10th day of March, 1952, came the Attorney for the Government and the defendant appeared in person and by counsel;

It Is Adjudged that the defendant has been convicted on a verdict of guilty of the crime charged in the indictment in the above entitled cause, to-wit, Attempt to Obtain Money under False Pretenses, committed in the Fourth Judicial Division, Territory of Alaska, on or about the 10th day of October, 1951, by the said Ralph G. Lemke, as the authorized agent of the Civilian Mess at Ladd Air Force

Base, signing and presenting for payment in the ordinary course of business, receipts for Sixty Dollars ($60.00) in value of merchandise, which receipts constituted an authorization to the seller, Paul Elbert, for payment of money in the amount set forth thereon, which said merchandise was known by the said Ralph G. Lemke not to have been received by the said Civilian Mess, it being prearranged that said Sixty Dollars ($60.00) when paid, would be divided, Twenty Dollars ($20.00) to the said Paul Elbert and Forty Dollars ($40.00) to the said Ralph G. Lemke; and the Court having asked the defendant whether he had anything to say why judgment should not be pronounced and no sufficient cause to the contrary being shown or appearing to the Court, and the Court being of the opinion that the minimum penalty prescribed by the Laws of the Territory of Alaska in the case of a person charged with Attempting to Obtain Money Under False Pretenses is manifestly too severe in this case; and the Court being fully advised in the premises;

It Is Adjudged:

That the defendant is guilty as charged in said indictment of the crime of Attempting to Obtain Money under False Pretenses and that he be confined in the [6] Federal Jail at Fairbanks, Alaska, for a period of six (6) months, such sentence to commence on the 10th day of March, 1952;

It Is Ordered that the Clerk of the Court deliver a certified copy of this Judgment and Commitment to the United States Marshal or other qualified

officer and that the same shall serve as the commitment herein and that the said defendant pay the costs of this action in the sum of $34.50 to be taxed by the Clerk of the Court.

Done at Fairbanks, Alaska, this 14th day of March, 1952.

/s/ HARRY E. PRATT,
District Judge. [7]

Entered in Court Journal: No. 43, Page 125. March 14, 1952.

[Endorsed]: Filed March 14, 1952.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Ralph G. Lemke, Fairbanks, Alaska, Defendant.

Julien A. Hurley, Fairbanks, Alaska, Attorney for Defendant.

Offense: Attempting to obtain money by false pretenses in violation of the provisions of Section 65-5-81, Alaska Compiled Laws Annotated, 1949.

Whereas, Ralph G. Lemke, the above named defendant, was duly tried and by jury's verdict convicted of the crime of attempting to obtain money by false pretenses in violation of Section 65-5-81, Alaska Compiled Laws Annotated, 1949, and was sentenced by the above entitled court on the 10th day of March, 1952, to be confined in the Federal Jail in Fairbanks, Alaska, for a period of six (6) months.

I, Ralph G. Lemke, the above named defendant, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above stated judgment.

Dated at Fairbanks, Alaska, this 11th day of March, 1952.

/s/ RALPH G. LEMKE,
Defendant.

/s/ JULIEN A. HURLEY,
Attorney for Defendant. [8]

Acknowledgment of Service attached.

[Endorsed]: Filed March 11, 1952.

[Title of District Court and Cause.]

UNDERTAKING ON APPEAL ON ADMISSION TO BAIL

A Judgment having been entered on the 10th day of March, 1952, in the above entitled Court whereby the above named defendant was convicted of the crime of attempting to obtain money by false pretenses in violation of Section 65-5-81, Alaska Compiled Laws Annotated, 1949, and was sentenced by the above entitled court on the 10th day of March, 1952, to be confined in the Federal Jail in Fairbanks, Alaska, for a period of six (6) months and the said defendant, Ralph G. Lemke, having ap-

pealed from said Judgment and been duly admitted to bail in the sum of Two Thousand Dollars ($2,000.00),

We, Robert B. Hoitt, of Fairbanks, Alaska, and by occupation a merchant, and Helen G. Husak, of Fairbanks, Alaska, by occupation a housewife, hereby undertake that the above named defendant, Ralph G. Lemke, shall in all respects abide and perform the orders and judgments of the above entitled court and of the appellate court upon the appeal, or if he fail to do so in any particular, that we will pay to the United States of America the sum of Two Thousand Dollars ($2,000.00) in which the defendant is admitted to bail.

/s/ RALPH G. LEMKE,
Principal.

/s/ ROBERT B. HOITT,
/s/ HELEN G. HUSAK,
Sureties. [9]

United States of America,
Territory of Alaska—ss.

Robert B. Hoitt and Helen G. Husak, each being first duly sworn, upon oath deposes and says:

That I am not a counselor or attorney at law, marshal, clerk of any court or other officer of any court;

That I am worth the sum specified in the above undertaking, to-wit: The sum of Two Thousand Dollars ($2,000.00), exclusive of property exempt

from execution and over and above all just debts and liabilities.

/s/ ROBERT B. HOITT
/s/ HELEN G. HUSAK

Subscribed and sworn to before me this 12th day of March, 1952.

[Seal] OLGA T. STEGER,
Deputy Clerk of the District Court, Fourth Division, Territory of Alaska.

Approved:

/s/ EVERETT W. HEPP,
United States Attorney.

Approved:

/s/ HARRY E. PRATT,
District Judge. [10]

Acknowledgment of Service attached.

[Endorsed]: Filed March 12, 1952.

[Title of District Court and Cause.]

INSTRUCTIONS REQUESTED BY THE DEFENDANT

I.

You are instructed that the laws of the Territory of Alaska, Section 66-13-59, provides as follows:

"Corroboration of testimony of accomplice. That a conviction can not be had upon the testi-

mony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime, and the corroboration is not sufficient if it merely show the commission of the crime or the circumstances of the commission. (CLA 1913, Sec. 2262; CLA 1933, Sec. 5352.)"

II.

You are instructed that the testimony of an accomplice is to be viewed with distrust and the oral admission of a party with caution.

III.

That the mere execution of a false token is not sufficient to justify a conviction. There must have been an actual attempt by the defendant or by Paul Elbert to obtain money by means of a false token. If the evidence is not sufficient to convince you beyond all reasonable doubt that such an attempt has been made in this case as charged in the indictment, then your verdict should be not guilty. [11]

Acknowledgment of Service attached.

[Endorsed]: Filed Feb. 27, 1952.

[Title of District Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD

To: John B. Hall, Clerk of the above entitled Court:

You will please prepare transcript of record in the above entitled cause, to be filed in the Office of the Clerk of the United States Court of Appeals for the Ninth Circuit sitting in San Francisco, California, upon the appeal heretofore perfected to said Court, and include therein the following papers and records, to-wit:

1. Indictment.
2. Motion to Dismiss Indictment.
3. Order overruling Motion to Dismiss Indictment.
4. Order, Plea and Setting Time for Trial.
5. Verdict.
6. Judgment and Commitment.
7. All Exhibits as follows: A and B.
8. Notice of Appeal.
9. Undertaking on Appeal on Admission to bail.
10. Instructions Requested by the Defendant.
11. Transcript of Testimony and Trial.
12. Praecipe for Transcript of Record.

The transcript is to be prepared as required by law and the rules and orders of this Court and the United States Court of Appeals for the Ninth Circuit and should be forwarded to said Court in San Francisco so that the same may be docketed therein on or before the 18th day of April, 1952. [126]

Dated at Fairbanks, Alaska, this 10th day of April, 1952.

/s/ JULIEN A. HURLEY,
Attorney for Appellant. [127]

Acknowledgment of Service attached.

[Endorsed]: Filed April 10, 1952.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John B. Hall, Clerk of the above-entitled Court, do hereby certify that the following list comprises all proceedings as per Praecipe for the Transcript of the Record by the defendant and appellant in the above-entitled cause, viz:

1. Indictment.
2. Motion to Dismiss the Indictment.
3. Minute Order denying the above Motion.
4. Plea and Setting Time for Trial.
5. Verdict.
6. Judgment and Commitment.
7. Notice of Appeal.
8. Undertaking on Appeal and Admission to Bail.
9. Requested Instructions of Defendant.
10. Transcript of the Testimony and Trial.
11. Praecipe for Transcript.
12. Government's Exhibits "A" and "B" in envelope.

Witness my hand and the seal of the above-entitled Court this 12th day of April, 1952.

[Seal] /s/ JOHN B. HALL,
Clerk of the District Court, Fourth Judicial Division,
District of Alaska.

In the District Court for the District of Alaska
Fourth Judicial Division

No. 1578-Cr.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

RALPH G. LEMKE,
Defendant.

Appearances: Everett W. Hepp, U. S. Attorney, of Fairbanks, Alaska, Attorney for plaintiff. Julien A. Hurley, of Fairbanks, Alaska, Attorney for defendant.

Date: February 26, 1952.
Place: Fairbanks, Alaska.

Before: Hon. Harry E. Pratt, District Judge and Jury. [12]

February 26, 1952, 10:00 a.m.

Be It Remembered, that upon the 26th day of February, 1952, the trial of this cause was begun, No. 1578 Criminal, plaintiff and defendant represented by counsel, the Honorable Harry E. Pratt, District Judge, presiding:

Clerk of Court: Court is now in session.

The Court: Call the roll of the veniremen.

(Whereupon the Clerk of the Court proceeded to call the roll.)

The Clerk: They are all present, Your Honor.

The Court: Very well. Swear them and proceed to qualify them.

(The special veniremen were sworn and qualified.)

The Court: The veniremen who have just qualified are now members of the regular panel of this jury.

(Thereupon a short recess was taken.)

The Court: Call the roll of the jury.

(Whereupon the Clerk of the Court proceeded to call the roll.)

The Clerk: All present except Mr. Barnett, Your Honor.

(Thereupon Mr. Hepp made a brief statement to the veniremen and Mr. Hepp and Mr. Hurley proceeded to impanel a jury.)

(A jury was duly impaneled and sworn to try the afore-mentioned cause.)

(Mr. Hepp presented his opening statement to the jury.) [14]

The Court: Do you care to start your opening address now, Mr. Hurley, or would you rather wait until after two?

Mr. Hurley: I don't care to make any opening

statement as far as I am concerned. The evidence will give clearly what the deal is, and I don't think it is necessary to make a statement to the jury, but I would like to make a motion to the Court on the statement made by the District Attorney.

The Court: Very well, the jury will be excused in a moment until two o'clock.

(Whereupon the Court duly admonished the jury and the jury was excused until two o'clock.)

Mr. Hurley: May it please the Court——

The Court: Mr. Hurley.

Mr. Hurley: I wish to make a motion at this time that the jury be instructed to return a verdict of not guilty, and in case the Court overrules that, I make a motion to dismiss the case, for the reason that the indictment fails to state facts sufficient to constitute a crime, and for the further reason that the statement of the District Attorney to the jury as to what he says constitutes the crime is not sufficient in itself to constitute the crime. He says that Mr. Elbert and the defendant prepared a false token and that that false token was turned over to somebody, but nowhere did he say in his statement that anybody attempted to obtain any money from the Ladd Air Force Mess, and the whole gist of the crime is attempting [15] to obtain money. The statute doesn't say that the preparation of a false token is sufficient to convict. It says you must attempt to obtain or obtain money by false pretenses by means of a false token, and all he has stated in his statement to the

jury was that Mr. Lemke—this other man prepared a false token, but he didn't say that anybody ever attempted to get money, and there can't be a crime unless there is an attempt to obtain or actually obtaining the money, and his statement doesn't show that anybody ever attempted to or did obtain any money.

The Court: Mr. Hepp.

Mr. Hepp: Your Honor, it is my understanding that it isn't even incumbent or necessary as a part of a case to make any opening statement any more than it is necessary for the defense to assert a defense to that action in the opening statement.

In the first place, I think the elements of the crime were spelled out, but I don't think it is proper to raise any claim of a deficiency of an opening statement. The issues are set forth in the indictment and the plea of not guilty puts into issue those points and it remains as to whether or not a prima facie case is shown in accordance with the indictment.

Your Honor, I believe I have a right to waive all opening statements and proceed immediately, and if a case were to go on to trial under those circumstances there is no prima [16] facie showing by a statement. It isn't in evidence. I can't convict this defendant by an opening statement. I don't see that it is a proper motion at all, and I assert that in any event there is sufficient evidence here and there are sufficient allegations in the indictment, and for that matter a sufficient allegation in the opening statement, if the matter were to go that far. I don't

believe that is a proper motion at all.

The Court: I will deny the motions.

(Whereupon the trial of this cause was adjourned until 2:00 p.m.)

The Court: Call the roll of the jury.

(Whereupon the Clerk of the Court proceeded to call the roll.)

The Clerk: They are all present, Your Honor.

The Court: Are counsel ready to proceed with the trial?

Mr. Hurley: We are ready, Your Honor.

Mr. Hepp: We are ready.

The Court: Very well, call your witness.

Mr. Hepp: Mr. Paul Elbert, please.

PAUL ELBERT,

a witness called by the plaintiff, after being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Hepp): Would you state your name to the jury, sir? [17] A. Paul Elbert.

Q. Where do you live, Mr. Elbert?

A. Mile Eight, on the Farmers Loop Road.

Q. How long have you lived there?

A. About eight years.

Mr. Hepp: Your Honor, excuse me a minute. I wonder if it is proper for me to proceed in the absence of the defendant.

Mr. Hurley: I just sent him over to get the transcript of the testimony at the preliminary hearing. He will be right back, Your Honor.

(Testimony of Paul Elbert.)

The Court: You are not objecting to going ahead.

Mr. Hurley: I am not objecting, Your Honor.

The Court: He has voluntarily left the courtroom.

Mr. Hurley: No objection.

The Court: Very well.

Q. (By Mr. Hepp): How long did you say you lived there? A. About eight years.

Q. What is your business, Mr. Elbert?

A. Truck-farmer, raising vegetables at the present time.

Q. Do you know the defendant, Ralph Lemke?

A. Yes, sir.

Q. How long have you known the defendant?

A. I have known him for seven or eight years, or so. [18]

Q. What is the nature of that association? Is that business, or social, or what?

A. It has mostly been business. He has been chef in the different restaurants around town. I have sold him vegetables over most of those years.

Q. Has that been reasonably steady or intermittently? A. Intermittently, yes.

Q. Are you acquainted with an organization known as the Civilian Mess at Ladd Air Force Base? A. Yes, sir.

Q. Is that a social or a business relationship, which?

A. That is a perennial business association. Every summer they buy vegetables from us.

(Testimony of Paul Elbert.)

Q. To your knowledge, was the defendant ever connected with that organization?

A. This last summer he was the manager. He bought vegetables from me.

Q. You say he bought vegetables from you?

A. Yes, during this last summer.

Q. Would that go on into the fall months also?

A. Yes, sir; at least through the month of August.

Q. At least——

Mr. Hurley: What was that?

The Witness: At least through the month of August.

Q. (By Mr. Hepp): Did you ever have occasion to discuss with Mr. Lemke— [19] I will withdraw that question. Are you familiar with the indictment that is on file in this case, the charges against Mr. Lemke? A. Yes, sir.

Q. Just yes or no for now. Did you ever discuss the matter out of which these charges grew with Mr. Lemke?

A. Not since the charge was made.

Q. No, I mean at any time.

Mr. Hurley: We object to that, Your Honor, as incompetent, irrelevant, and immaterial.

The Court: I will sustain the objection. It makes it too complicated.

Q. (By Mr. Hepp): When you would sell the Civilian Mess groceries or produce or vegetables, as you say, was there any record kept of that? How was that transaction made?

(Testimony of Paul Elbert.)

A. We used an ordinary grocery sales slip made in duplicate; one copy was given to the man who signed at the time he signed, and I kept a duplicate. If there was any question I presented it at the end of the month or whenever payment was to be made.

Q. You mean you delivered vegetables and took a signed receipt for that? A. That is right.

Q. Did Mr. Lemke ever approach you on any matter on [20] which receipts might be made for which no delivery was intended? A. Yes, sir.

Q. Do you recall when he mentioned this to you or discussed this matter with you?

A. Yes, sir.

Q. When was that?

A. That was either the eighth or ninth of October, in the Northern Commercial Company garage on Fourth Avenue.

Q. What was the occasion of your being at the garage?

A. I don't remember just what I was there for but——

Q. I see. You talked with Mr. Lemke at that time? A. That is right.

Q. Would you state to the jury what your discussions were?

A. In the month of August I sold the Civilian Mess vegetables five different times and four of the bills were paid about the middle of September and one was missing, so every few days or a week or so I would see Mr. Lemke and ask him about those missing bills, and usually the bills were paid on my

(Testimony of Paul Elbert.)

presentation of the signed duplicate, but he kept asking me to make out a new bill, and I kept hesitating because it wasn't ordinary procedure, and when we accidentally met in the N. C. garage I asked him about this again, and he said, "Make out a new bill," and he called me over to a corner and says, "How [21] would you like to make some easy money?" and I said——

Mr. Hurley: I move that that be stricken out as not responsive to the question.

Mr. Hepp: I believe, Your Honor, it is directly responsive.

The Court: Objection overruled.

Mr. Hurley: Exception.

Q. (By Mr. Hepp): Would you continue, Mr. Elbert?

A. I said, "I have had to work pretty hard for my money. I would like some easy money." He said, "You make out a bill for $60. When it is paid you keep twenty and give me forty," and I just kind of shrugged and we parted and I thought no more about it until the next day. The morning of the tenth I was going out to Ladd Field, and I was going by the O.S.I., so I reported the incident to them.

Q. Did you tell them the substance of this transaction? A. That is right.

Q. What did you do in response to any advice or otherwise that they might have given you at that time? A. Well——

(Testimony of Paul Elbert.)

Mr. Hurley: We object to that as incompetent, irrelevant and immaterial.

The Court: Objection overruled.

A. I reported it to Mr. Tweedy. I know Tweedy of the [22] O.S.I. So he called in his superior officer and asked me to tell them the same statement, and I believe it was Captain Kefler, or something like that, said he wasn't surprised, that the——

Mr. Hurley: I object to that as hearsay.

The Court: Objection sustained.

Q. (By Mr. Hepp): You just state what you did in response to anything that might have been the outcome of that meeting with the O.S.I.

A. They told me——

Mr. Hurley: I object to that as hearsay and not the best evidence, what they told him.

The Court: Objection sustained.

Q. (By Mr. Hepp): Would you just state what you did in response to anything——

Mr. Hurley: I object to that.

The Court: Objection overruled.

Mr. Hurley: As incompetent, irrelevant, and immaterial. What he did is all right, but what somebody told him is not material.

Mr. Hepp: Your Honor, I just asked him what he did in response.

Mr. Hurley: Let him do it.

The Court: The question was what he did, not what they [23] told him.

The Witness: Yes, O.K.

(Testimony of Paul Elbert.)

Q. (By Mr. Hepp): Would you state what you did? A. I reported to the O.S.I.——

Mr. Hurley: I object to what he reported as incompetent, irrelevant, and immaterial.

The Court: It is a repetition now. I will sustain that objection.

Mr. Hepp: I believe my question was misunderstood.

Q. (By Mr. Hepp): Mr. Elbert, you have testified, I believe, that you went to the O.S.I. and you reported this conversation you had had with Mr. Lemke. A. That is right.

Mr. Hurley: I object to the District Attorney rehashing what he testified to. He has a right to ask questions, but he hasn't a right to repeat what he thinks the testimony is that he wants.

The Court: Objection overruled.

Q. (By Mr. Hepp): We will start all over, Mr. Elbert, at this snag. Following the time and taking things in the sequence of their occurrence, in which you stated to the O.S.I. the substance of this conversation that you had with Mr. Lemke, what, if anything, [24] did you do concerning same, either of your own volition or in response to anybody else?

A. After reporting to the O.S.I., I then within the half hour went down to the Civilian Mess and asked Mr. Lemke again about the $20.40 of the previous month, and he said, "Make out a ticket." So I made the ticket out and then he called me aside, clear out of the room and into an adjoining room

(Testimony of Paul Elbert.)

and said, "Will you go for this other deal?" and so—this is kind of hard, since you have got me bound up there.

Q. Did you respond to his statement—to his question?

A. Yes. He said, "Will you go for it?" and I said, "Why not?" and I previously made out a ticket for $60, as he had suggested, but on presentation of the ticket he said, "Let's make it out in three twenty-dollar tickets." This was the tenth. I dated the first one the eighth, I believe it is, for twenty dollars worth of cabbage, the second one on the ninth for twenty dollars worth of celery, and then he turned over several pages in my book and said, "Skip a few pages," and I wrote the third one, I believe, for twenty dollars worth of cabbage again.

Q. You said you had a ticket made out for sixty dollars which was unsatisfactory; is that right?

A. That is right.

Q. Where had that ticket been made out, if you know?

A. That ticket I made out in the presence of the O.S.I. [25] before I went down there, and they had initialed it.

Q. But this sixty dollar ticket was evidently unsatisfactory, so Mr. Lemke asked you to make out three twenties? A. Yes.

Q. Did you in fact make out three twenties?

A. I made out three twenties, yes, sir.

Q. Had you delivered the material which those tickets represented? A. No, sir.

(Testimony of Paul Elbert.)

Mr. Hepp: Mr. Clerk, I would like to have this receipt book marked for identification, please.

The Clerk: Government's Identification No. 1.

(The receipt book was marked Government's Identification No. 1.)

Mr. Hurley: I would like to see it, if there is no objection.

Mr. Hepp: Surely.

Q. (By Mr. Hepp): In the course of your testimony, Mr. Elbert, I believe you mentioned when you sold produce out at the Civilian Mess that you had a regular sales receipt. Would you describe that, please, what kind of receipts or books or records did you keep of that transaction?

A. We usually buy these books at the stationery store and I believe they are called grocery sales books. Anyway, [26] there is an original and a carbon duplicate.

Q. And you used that, what you might call garden variety of sales book that they use in grocery stores? A. That is right.

Q. Was that the kind of a sales book with which you transacted business with Mr. Lemke when he was the manager of the Civilian Mess?

A. That is right.

Q. Now, Mr. Elbert, I show you Government's Identification No. 1, and ask you to examine it fully and then state if you know what it is.

A. That is the sales book I used in my transactions in the month of August with Mr. Lemke—or October, rather.

(Testimony of Paul Elbert.)

Q. Is there any writing on the first page?

A. Yes, that is the bill that I made out in the presence of the O.S.I. for the sixty dollars that Mr. Lemke first suggested. It is dated on the tenth of October.

Q. Is that an integral part of that book?

A. Yes.

Q. It is attached in its normal binding, is it?

A. That is right. There is the original and the duplicate here; the original having not been acceptable to Mr. Lemke, we rewrote the three twenties.

Q. What is the next? Is there any writing on the pages following the first? [27]

A. The next page is page 39, and that is the duplicate of the August ticket for $20.40 worth of cabbage, and that is a legitimate bill.

Q. Had you delivered cabbage in that amount?

A. I had delivered cabbage in that amount in August, yes, sir.

Q. Following that bill, do you find any writing on the succeeding page?

A. Yes, that is page 40 and is for 400 pounds of cabbage and is dated on the eighth. Mr. Lemke asked me to stagger the dates, so I dated it back on the eighth so it would appear that there wasn't too much produce bought on one day.

Q. Is there any signature appearing on that writing?

A. Mr. Lemke's signature appears on that.

Q. Did you deliver the cabbage, that 400 pounds of cabbage? A. No, sir.

(Testimony of Paul Elbert.)

Q. Did Mr. Lemke know that you had not delivered that cabbage? A. That is right.

Q. Are there any writings on the successive pages of that book?

A. Ticket 41 is for 100 pounds of celery, $20, also signed by Mr. Lemke and dated the ninth. [28]

Q. Is there any writing on any of the successive sheets of that booklet?

A. Then he took the book out of my hand and turned several pages, arriving at page 48. I wrote out a ticket for twenty dollars worth of cabbage again, and Mr. Lemke signed it, and that is dated the tenth.

Q. Are any of the sheets in that booklet attached in a manner other than that book was when you first received it, or purchased it?

A. They appear in their natural order, natural binding, yes.

Q. They appear as though they have never been torn out and replaced?

A. That is right.

Q. Is that book substantially in the same condition as when you saw it last? A. Yes, sir.

Q. That was your personal book that you kept the record of transactions in; is that right?

A. That is right.

Q. On this second entry of celery, twenty dollars worth of celery, did you deliver twenty dollars worth of celery on this date as reflected by this bill to the Civilian Mess Hall? A. No, sir.

(Testimony of Paul Elbert.)

Q. Did Mr. Lemke know whether or not you had delivered it? [29] A. Yes, sir.

Q. By that you mean what? That he knew that you had or hadn't?

A. He knew that no celery was delivered.

Q. And the last item on bill No. 48, the 200 pounds of cabbage, twenty dollars, did you deliver that cabbage as reflected on this bill?

A. No, sir.

Q. Did Mr. Lemke know that you hadn't delivered it?

A. He knew that I had not, yes, sir.

Q. Did you ever get your $20.40?

A. Not yet.

Q. By any thought processes of reasoning, Mr. Elbert, were you able to tie in any of the conversations that you have testified to in this back room, during which time these tickets were made out, with the original conversation you had had with Mr. Lemke down in the N.C. garage?

A. It was a continuation of the same big deal.

Q. That easy money that you testified concerning? A. That is right.

Q. Did you have any further conversation with Mr. Lemke concerning this matter—just yes or no.

A. No.

Q. At any time during the course of these transactions did either Mr. Lemke in your presence or you in his presence [30] suggest that this might be a good deal to continue on?

(Testimony of Paul Elbert.)

Mr. Hurley: I object to that as leading and suggestive.

The Court: Objection sustained.

Q. (By Mr. Hepp): Now, Mr. Lemke, at any time following this date on which these tickets were made out, did Mr. Lemke ever address you at any time following this? Did he ever say anything to you?

A. Yes, sir.

Q. Would you state the time, if you can, or as nearly thereto?

A. That is pretty hard. I wouldn't remember the time.

Q. Could you guess at it in terms of weeks or months afterwards or at any other date that you could fix?

A. Two or three weeks afterwards.

Q. Where was that?

A. In the card room of the Pastime.

Q. At that time, to your knowledge, did Mr. Lemke know that you had reported this matter?

Mr. Hurley: I object to that as incompetent, irrelevant, and immaterial, and not proper examination.

The Court: Objection sustained.

Q. (By Mr. Hepp): Mr. Elbert, what did Mr. Lemke say?

Mr. Hurley: I object to that as incompetent, irrelevant [31] and immaterial.

Mr. Hepp: Your Honor, I believe——

The Court: The objection is overruled.

Mr. Hurley: Save an exception.

(Testimony of Paul Elbert.)

A. I was passing through the Pastime cardroom to go to the toilet in the back and Mr. Lemke was playing cards and the room was quite full, and as I came in the door he eyed me and rose up in his seat and said, "Hello, you prick."

Mr. Hurley: What was that answer? I didn't get it.

The Witness: He rose up in the cardroom in a voice that everybody could hear and said, "Hello, you prick."

Q. (By Mr. Hepp): Is Ladd Field in the Fourth Judicial Division of the Territory of Alaska, Mr. Elbert? A. I am not sure.

Q. How far is it from the town of Fairbanks?

A. About three miles.

Mr. Hepp: May I have just a moment, Your Honor.

The Court: Very well.

Mr. Hepp: You may question the witness.

Cross Examination

Q. (By Mr. Hurley): Who prepared these receipts that you say are false receipts, false bills? Whose handwriting are they in?

A. They are in my handwriting. [32]

Q. You prepared these false bills?

A. I certainly did.

Q. I see, and who O.K.'d them?

A. The O.S.I.

Q. And you say that Mr. Lemke wanted you to go in the deal with him? A. That is right.

Q. And he believed that you would turn over

(Testimony of Paul Elbert.)

$40 and you keep $20 on a deal to steal from the mess; is that what you want the jury to believe?

Mr. Hepp: I object to that. I don't think this witness is qualified to answer what Mr. Lemke may have believed. I don't think that is a proper question.

Mr. Hurley: That is the deal, Your Honor. That is the whole story.

The Court: I think you can show by what was said.

Mr. Hurley: Yes.

Q. (By Mr. Hurley): And that was the understanding, was it, between you and Mr. Lemke, that you and Mr. Lemke were to steal $60 from the mess and you were to give Mr. Lemke $40 and you were to get $20 when you wrote those out; that was the deal? A. That was the deal.

Q. And you wrote them out?

A. I wrote them out. [33]

Q. And you want the jury to believe that you are an honest man, when you wrote out false receipts or false bills?

Mr. Hepp: I object. The jury can draw their own conclusions as to the statements of what happened.

Mr. Hurley: This is cross-examination, Your Honor.

The Court: I will overrule the objection.

Q. (By Mr. Hurley): And you want the jury to believe when you wrote these false receipts that you are an honest man; is that the idea?

(Testimony of Paul Elbert.)

A. I certainly do.

Q. What? A. I certainly do.

Q. I see.

A. I had been to the O.S.I. a half an hour before.

Q. Yes.

A. May I answer your question?

Q. Go right ahead. Whom did you see at the O.S.I.?

Mr. Hepp: Just a minute.

Q. (By Mr. Hurley): Who did you see at the O.S.I.? Who did you talk to?

A. Captain Kefler.

Q. Captain Kefler? A. And Tweedy.

Q. And he entered in this deal with you, did he, to try to trap this defendant? [34]

A. The instructions were explicitly——

Q. I say: he entered into the deal with you?

A. The instructions——

Q. Answer the question. He entered into the deal with you?

Mr. Hepp: Just a minute. I object to the belligerent, argumentative attitude that counsel is taking towards this witness.

Mr. Hurley: I think I have a right to ask the questions and demand an answer.

The Court: I will sustain the objection.

Q. (By Mr. Hurley): Did he enter into the deal with you?

A. Not in the way you are implying.

Q. I don't know what I am implying. I just want to know what the facts are. So you went there

(Testimony of Paul Elbert.)

and made out false bills? A. That is right.

Q. And you got Mr. Lemke to sign them?

A. I didn't induce him to sign them.

Q. You didn't?

A. It was his idea all the way through.

Q. It was his idea; it wasn't yours?

A. That is right.

Q. You just made them out on his idea? [35]

A. Yes.

Q. Just made out false bills on his idea?

A. That is right.

Q. I see. Do you think that is honest?

A. May I explain to the jury?

Q. I say: do you think that is honest to make out false bills? A. Of course not.

Q. Just answer the question yes or no: do you think that is honest? A. No.

Q. I don't think so either. After you made out these false bills, you say Mr. Lemke O.K.'d them; is that right? A. Yes, sir.

Q. I see, and did you or Mr. Lemke either one ever attempt to obtain money on these false bills? Just answer yes or no.

Mr. Hepp: I object to that.

Q. (By Mr. Hurley): Did either one of you ever attempt to obtain money on these false bills?

A. Yes.

Q. Who?

A. He turned them in in the due process of business to the bookkeeper.

Q. I say: did he attempt to get money on them?

(Testimony of Paul Elbert.)

Mr. Hepp: I object. That may be a question of law for the Court to decide.

Mr. Hurley: It isn't a question of law. It is a question of fact, Your Honor.

Mr. Hepp: I would like to complete my statement.

The Court: You interrupted the witness before he could finish his answer to your question. He answered part of it.

Mr. Hepp: I object to the question, Your Honor. I think counsel can ask anything that happened or was said concerning this matter, but as to legal definitions and things like that, I don't think this witness is qualified to answer nor is the Government bound by his answer. It is a question first of fact for the jury to decide, and any legal implications that may be involved——

Mr. Hurley: The statute will advise that any person who attempts to obtain any money by false pretenses through a false token is guilty whether he obtains it or attempts to obtain it. I am asking this man whether he ever attempted to obtain money on this transaction or whether the defendant ever attempted to obtain money on this transaction.

The Court: Yes. Objection overruled. He may answer.

Q. (By Mr. Hurley): Did you or the defendant ever attempt to obtain money from the Mess on this transaction, either one of you ever attempt to get the money? A. I can't answer for him.

(Testimony of Paul Elbert.)

Q. You can answer; you know whether you tried to get it, or not, don't you?

A. No, I didn't try to get it.

Q. Did he try to get it that you know of?

A. I know that he turned——

Q. Answer the question.

A. I don't know.

Q. Did he ever try to get the money, that you know of? A. No, he did get the——

Q. Answer my question.

The Court: Just a minute.

Q. (By Mr. Hurley): Did he try to get the money himself that you know of?

The Court: Let him answer. Keep quiet a moment. Give your answer to it.

The Witness: No, I don't know whether Mr. Lemke——

Q. (By Mr. Hurley): Did you ever attempt to get the money?

Mr. Hepp: Your Honor, I object. Counsel doesn't give this witness an opportunity to answer.

Mr. Hurley: He has answered plenty.

The Court: He has already answered that question, Mr. Hurley. [38]

Q. (By Mr. Hurley): Did you try to get the money?

Mr. Hepp: I object to that as repetitious.

The Court: Objection sustained.

Mr. Hurley: What did he say?

The Court: He said he did not.

(Testimony of Paul Elbert.)

Mr. Hurley: That is all. That is what I wanted to know. That is good.

The Court: Any further cross-examination?

Mr. Hurley: No, no further cross-examination.

Redirect Examination

Q. (By Mr. Hepp): Now, Mr. Elbert, did you consider yourself dishonest when you——

Mr. Hurley: What he considered himself doesn't have anything to do with the case; incompetent, irrelevant and immaterial, what he considered himself. If he is a crook, his answers show it.

The Court: Read what Mr. Hepp said.

(The reporter read the last question, as heretofore recorded.)

Mr. Hepp: I would like to finish the question and then if necessary state to the Court the basis upon which it ties in with Mr. Hurley's question as a rebuttal question.

Q. (By Mr. Hepp): Did you consider yourself dishonest when you wrote [39] these tickets out in the back room of the Civilian Mess?

Mr. Hurley: I object to that.

The Court: Objection sustained.

Mr. Hurley: And what he considered himself has nothing to do with the case. I object to it as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Mr. Hepp: I wonder if I could request a question reread that Mr. Hurley asked and was answered in the course of his cross-examination. I am not quite sure I remember every word of it.

(Testimony of Paul Elbert.)

The Court: I don't want to go back. How far in the past was it?

Mr. Hepp: I think it was about half way through cross-examination.

The Court: No, I don't think that is permissible at this time.

Mr. Hurley: You should remember.

Mr. Hepp: I am going to object to counsel's constant talking here when he is not addressing the Court. He is just making comments for the benefit of the jury that I don't think have a proper place in this trial.

The Court: I will sustain that objection.

Mr. Hurley: I will refrain, Your Honor.

The Court: Very well. [40]

Q. (By Mr. Hepp): Mr. Elbert, were any of your accounts concerning the making out of these tickets contrary to any of the instructions you may have received from the O.S.I. concerning them?

Mr. Hurley: I object to that as calling for a conclusion, hearsay evidence, and incompetent, irrelevant, and immaterial, not the best evidence, and calling for the conclusion of the witness.

Mr. Hepp: Your Honor, I believe I have a right to question this witness concerning his own intentions in the matter concerning these tickets. Counsel went into it at length.

The Court: Yes, objection overruled.

Mr. Hepp: Answer the question, please.

The Witness: Will you state the question again, please?

(Testimony of Paul Elbert.)

Mr. Hepp: Read it, please.

(The reporter read the last question, as heretofore recorded.)

Mr. Hurley: The same objection, Your Honor.

The Court: Objection overruled.

A. No, sir.

Q. (By Mr. Hepp): What was your *question,* Mr. Elbert? A. No, sir.

Q. Do you know what organization the O.S.I. is, Mr. Elbert? [41]

A. That is the Office of Special Investigation.

Mr. Hepp: I believe that is all.

Recross Examination

Q. (By Mr. Hurley): They didn't have anything to do with the Civilian Mess at Ladd Air Force Base; do you know what the Civilian Mess at Ladd Air Force Base is?

A. Yes, the mess hall to take care of the civilian employees.

Q. Do you know what it is, the Civilian Mess at Ladd Air Force Base? A. Yes, sir.

Q. And this is another organization that you have been testifying about?

A. Civilian Mess, it is the civilian cafeteria. I used that expression. It is the same organization.

Q. I thought you said it was O.S. or something.

A. The O.S.I. is the Office of Special Investigation, which is comparable to the F.B.I.

Q. And that is something else?

A. That is right.

(Testimony of Paul Elbert.)

Q. But they have nothing to do with the Civilian Mess at Ladd Air Force Base?

A. They are initials——

Q. I say: they have nothing to do with the Civilian Mess [42] at Ladd Air Force Base; they are not a part of it?

A. They are not a part of it.

Q. I just wondered, that is all. And you talked to somebody out there, some branch of the service out there, you called it what?

A. O.S.I., Office of Special Investigation.

Q. And that is where you went to tell about the deal you were going to put over?

A. That is right.

Mr. Hurley: That is all.

(Witness excused.)

Mr. Hepp: Call Mr. George Tweedy, please.

GEORGE M. TWEEDY,

a witness called by the plaintiff, having first been duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Hepp): Would you state your name to the jury, please? A. George M. Tweedy.

Q. How long have you been around this area, Fairbanks?

A. A little more than three years.

Q. By whom are you employed, Mr. Tweedy?

A. By the U. S. Air Force.

Q. And in what capacity?

(Testimony of George M. Tweedy.)

A. I am a Special Agent in the Office of Special Investigations. [43]

Q. Would you state briefly what is the Office of Special Investigation?

A. It is the investigative section of the Air Force under the Inspector General's Department.

Q. What do you investigate?

A. All crimes of moral turpitude background and *administrate* investigations.

Q. During the period of time that you have been in the Fairbanks area, have you been employed by this same organization? A. I have.

Q. Now, Mr. Tweedy, do you know the defendant, Mr. Lemke? A. No, I do not.

Q. Are you acquainted with an organization known as the Civilian Mess Hall at Ladd Field?

A. Yes, sir.

Q. Do you know one Paul Elbert?

A. I do.

Q. How long have you known Mr. Elbert?

A. About 18 months.

Q. Just yes or no, did you have occasion to see Mr. Paul Elbert around the tenth day of October of 1951? A. Yes. [44]

Q. Where did you see him?

A. In our office at Ladd Field.

Q. That is the O.S.I. office?

A. That is the O.S.I. office.

Q. Were you on duty at that time?

A. I was.

Q. Just in a simple word, was Mr. Elbert's occa-

(Testimony of George M. Tweedy.)

sion of being there business or social or pleasure or what? A. It was business.

Q. Yes or no, please: did that business concern in any way the defendant, Mr. Lemke?

A. Yes.

Q. I am going to show you Government's Identification No. 1, having been identified as a sales book belonging to Mr. Elbert, and ask you to examine it and state if you have seen it before, please.

Mr. Hurley: I object to that as incompetent, irrelevant and immaterial whether he ever saw it or not.

The Court: Objection overruled.

Mr. Hurley: Save an exception.

A. I have.

Q. (By Mr. Hepp): How do you know you have?

A. On the back side of receipts 40 and 41, there are my initials. [45]

Q. Where did you see that before?

Mr. Hurley: Same objection, Your Honor.

The Court: Same ruling.

Q. (By Mr. Hepp): Where did you see this before?

A. Originally in our office, O.S.I. office.

Q. And in whose custody was it at that time?

A. Mr. Paul Elbert.

Q. Just yes or no: does any subject matter that you may be able to identify in this book relate in any way to the business matter about which Mr. Elbert came to see you? Just yes or no.

(Testimony of George M. Tweedy.)

A. Yes.

Mr. Hurley: I object to that as incompetent, irrelevant and immaterial and calling for a conclusion of the witness.

The Court: Objection overruled.

Mr. Hurley: Save an exception.

Q. (By Mr. Hepp): It did relate to the business that—— A. Yes.

Q. Were you able to tell, Mr. Tweedy, by the statements made by Mr. Elbert, whether he was going to or had just come from a visit with the defendant?

Mr. Hurley: I object to that as incompetent, irrelevant and immaterial, calling for a conclusion, and hearsay. [46]

Mr. Hepp: Your Honor, I——

The Court: Objection overruled.

A. He was going to—I interpreted it that way.

Mr. Hurley: I move the answer be stricken as hearsay and a conclusion.

Mr. Hepp: Your Honor, I don't believe that that is hearsay. A person can have an understanding in a conversation.

Mr. Hurley: When he interprets something I don't think it is evidence. Maybe I am wrong, but I make my motion and I save my exception.

The Court: I will sustain the objection.

Mr. Hepp: Pardon?

The Court: I will sustain the objection. It is hearsay.

Mr. Hurley: The answer is stricken?

(Testimony of George M. Tweedy.)

The Court: Yes, the answer may be stricken.

Mr. Hepp: That is all,

Cross Examination

Q. (By Mr. Hurley): And, Mr. Tweedy, how long had you known this farmer out here whose name was Elbert or something like that?

A. Approximately 18 months, I believe.

Q. And you are with whom?

A. The O.S.I.

Q. And you don't have anything to do with the Mess? A. No. [47]

Q. I see; and you say he came up and talked to you? A. He did.

Q. And that is about all you know about this case, isn't it, just what he told you?

A. What he told me, yes, sir.

Q. That is all you know about it; you don't know anything of your own knowledge about the case? A. No.

Mr. Hurley: I see. That is all.

Mr. Hepp: That is all, Mr. Tweedy.

(Witness excused.)

Mr. Hurley: I wonder if we could have about a ten-minute recess, Your Honor.

The Court: Very well. Ten-minute recess.

The Clerk: Court is recessed for ten minutes.

(A ten-minute recess was taken.)

The Clerk: Court is reconvened.

The Court: Will counsel stipulate all members of the jury are present?

Mr. Hurley: Yes, Your Honor.

Mr. Hepp: We so stipulate.

The Court: Very well.

Mr. Hepp: May it please the Court, I would like permission to recall that last witness and ask him about two questions on direct-examination, a matter that I overlooked. [48]

Mr. Hurley: No objection, Your Honor.

Mr. Hepp: Will you take the stand, Mr. Tweedy?

GEORGE M. TWEEDY,

a witness previously called by the plaintiff and sworn, was recalled and testified further as follows:

Direct Examination

Q. (By Mr. Hepp): Now, Mr. Tweedy, I believe you testified that you had seen this Government's Identification No. 1, being a sales book, before? A. Yes, sir.

Q. Did you ever have occasion to see it more than once, Mr. Tweedy? A. Yes, I did.

Q. During what interval of time elapsed between the time when you first saw it and the time when you saw it again?

A. The first time was approximately 10:45 or 11:00 o'clock. The second time was somewhere in the neighborhood of two o'clock in the afternoon.

Q. Was that on the same day?

A. On the same day.

Mr. Hurley: What day was that?

Q. (By Mr. Hepp): Do you recall what day

(Testimony of George M. Tweedy.)

that was? A. Tenth of October, 1951. [49]

Q. The tenth of October. Now, Mr. Tweedy, was there any difference that you know of your own knowledge in this sales book at the time when you saw it first and the time when you saw it next? Now, just examine it, please.

Mr. Hurley: I object to that as incompetent, irrelevant and immaterial.

The Court: Objection overruled.

Mr. Hurley: The sales book has nothing to do with the transaction.

Mr. Hepp: On the contrary, Your Honor.

The Court: Objection overruled.

Mr. Hurley: This is a book kept by the man that says he made out all statements——

The Court: I have overruled the objection, Mr. Hurley.

Mr. Hurley: Save an exception.

A. Yes.

Q. (By Mr. Hepp): What difference is there, Mr. Tweedy?

A. When I first saw it, there were no receipts made out past 38, No. 38, during the first time I saw it.

Q. When you saw it next, were there any receipts past page 38?

Mr. Hurley: Same objection.

The Court: Same ruling.

A. Yes, they were past 38. [50]

Q. (By Mr. Hepp): What receipts did you see that you hadn't seen at ten o'clock?

(Testimony of George M. Tweedy.)

A. 39, 40, and 41.

Q. Is it 41? A. And 48.

Q. Would those be the transactions: 39 is $20.40, 40 is $20 worth of cabbage, 41 is $20 worth of celery, and 48 being $20 worth of cabbage?

A. That is correct.

Mr. Hurley: Same objection, Your Honor.

The Court: Same ruling.

A. That is correct.

Q. (By Mr. Hepp): And how can you tell that is the same book that you are looking at now that you have testified to seeing?

A. The new receipts have my initials on all of them on the back side.

Q. Now, Mr. Tweedy, did the changes in this sales book, that is to say, the difference between the sales book as of ten o'clock in the morning on the tenth and at two o'clock or thereabouts in the afternoon—just yes or no—did those differences relate to any subject matter that Mr. Elbert came to see you about?

Mr. Hurley: I object to that as incompetent, irrelevant, [51] and immaterial, and calling for hearsay testimony.

The Court: Objection overruled.

A. Yes.

Mr. Hepp: You may question.

Cross Examination

Q. (By Mr. Hurley): Who made out these false bills, do you know?

A. I don't understand your question.

(Testimony of George M. Tweedy.)

Q. Who made out these false bills, do you know?

A. Mr. Elbert made out the bill.

Q. He made out the false bills, is that right?

A. He made out the bills in the book there.

Q. And they were false bills, you knew that?

A. I have no knowledge.

Q. You had no knowledge about it; he told you they were absolutely fair bills?

A. I don't understand your question.

Q. I say: he made out the false bills, is that right, that you saw?

A. The bills in the book there, he made those out.

Q. And as far as you know they were false bills; he made them out as far as you know?

A. As far as I know he made them out, yes.

Mr. Hurley: That is all.

(Witness excused.) [52]

Mr. Hepp: Lieutenant Kieffer, please.

WILLIAM L. KIEFFER,

a witness called by the plaintiff, after being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Hepp): Would you state your name to the jury, please?

A. William L. Kieffer.

Q. Are you in the Armed Forces?

A. Yes, sir, the Air Force.

Q. What is your rank and station, please?

A. First Lieutenant, stationed at Ladd Air Force Base.

(Testimony of William L. Kieffer.)

Q. In what capacity?

A. As the Deputy District Commander of the Office of Special Investigation.

Q. Would you explain very briefly what the Office of Special Investigation is or does?

A. Well, rather than go into a lot of detail, I think I could say it very shortly in a phrase everyone could understand, that it is a lot like the F.B.I. in civilian life.

Q. The Federal Bureau of Investigation in civilian life?

A. Yes. We are the Federal Bureau of Investigation of the Air Force.

Q. As such, do you take cognizance of occurrences and happenings that are on the military reservation of Ladd Field? [53]

A. Yes, sir.

Q. Do you know Mr. Elbert?

A. Yes, sir; I do.

Q. Do you know Mr. Lemke, the defendant in this action? A. No, sir; I don't.

Q. Were you so employed in the O.S.I. or associated with the O.S.I. on the tenth day of October of 1951?

A. Yes, sir; I was assigned as the Acting District Commander at that time.

Q. Lieutenant Kieffer, I am going to show you Government's Identification No. 1, having been identified as a sales book of Mr. Elbert, and ask you to look at it, examine it carefully, and after

(Testimony of William L. Kieffer.)

you have finished, state whether you have ever seen that before.

Mr. Hurley: I object to that as incompetent, irrelevant and immaterial whether he saw it.

The Court: Objection overruled.

Mr. Hurley: I don't see where it has anything to do with the case.

The Court: Objection overruled.

Mr. Hepp: Just examine it thoroughly, Lieutenant Kieffer, from one end to the other.

Mr. Hurley: There is no evidence as to the transactions—to ask him if he saw it. You could ask a thousand people.

The Court: I have already overruled the objection. [54]

A. Yes, sir; I have seen it before.

Q. (By Mr. Hepp): When did you see it, sir?

A. On the 10th of October, 1951, in the morning.

Q. Where? A. In my office.

Q. Where is your office?

A. On Ladd Air Force Base.

Q. That is the office of O.S.I., is it?

A. Yes, sir.

Q. Did you ever have occasion to see that book following the time that you have testified to?

Mr. Hurley: I object to that as incompetent, irrelevant and immaterial.

Mr. Hepp (continuing): That is to say, the morning——

Mr. Hurley: I object to that as incompetent, irrelevant and immaterial.

(Testimony of William L. Kieffer.)

The Court: Objection overruled.

The Witness: What was your question again?

Q. (By Mr. Hepp): Did you have occasion to see it at any hour or time subsequent to ten o'clock, I believe you said, on October 10th; did you ever see that book again at any hour or time subsequent to that?

A. Yes, sir; I saw this book, I believe, again in the [55] afternoon of the same day.

Q. Was there any difference in the book at that time than when you saw it?

A. Yes, there was.

Mr. Hurley: Same objection, Your Honor.

The Court: Same ruling.

A. (Continuing) I am positive that the morning that I saw it, the last entry that was made in this book was on Ticket 38.

Q. (By Mr. Hepp): On the afternoon, did you find any other entries made?

A. In the afternoon of that same day I noted that tickets behind 38 had been written on, that is, the duplicate. The original was gone.

Mr. Hepp: You may question the witness.

Cross Examination

Q. (By Mr. Hurley): You saw this book about ten o'clock, you say, on the morning——

A. No, sir; I didn't state the time.

Q. What time?

A. It was in the morning.

Q. Yes, and this ticket that you refer to, Ticket 38, was already prepared when you saw it in the

(Testimony of William L. Kieffer.)

morning, and you [56] said the other tickets were there in the afternoon; is that right?

A. No, I don't think I mentioned that the ticket was already prepared.

Q. Oh, it wasn't?

A. I don't believe I said that before.

Q. What did you say? Was it prepared when you saw it in the morning?

A. I don't remember whether that ticket No. 38 was prepared while it was there that morning.

Q. And it was shown to you by whom?

A. Mr. Elbert.

Q. He showed you ticket 38? A. Yes.

Q. When he came into your office?

A. No, he didn't show me ticket 38 when he came in.

Q. When did he show it to you?

A. Sometime after that.

Q. After he came he showed you ticket 38?

Mr. Hepp: Your Honor, I believe that question is misleading. I believe this witness said he saw it prepared, I am not quite sure, but I don't believe counsel's question is fair.

Mr. Hurley: I don't know why it isn't fair. He said 38 was shown to him and the other tickets were shown to him in the [57] afternoon.

The Court: Objection overruled.

Q. (By Mr. Hurley): You say he brought this ticket in, 38, and that was there when he talked to you; is that right?

(Testimony of William L. Kieffer.)

A. I think that the ticket was prepared in our office.

Q. I see. When you talked to him ticket 38 was prepared, and the other tickets you saw afterwards; is that right?

A. Ticket 38 was prepared before he left the office that morning, because I put my initial on it.

Q. I see, but he brought it in to you?

A. Not already prepared.

Q. How do you know?

A. Because it was prepared in the office.

Q. He prepared it in the office?

A. I don't think I can say positively to that, because I don't recall whether he actually prepared it in the office, but I think he did.

Q. You think, but you don't know?

A. I can't say positively.

Q. You knew it was a false ticket, didn't you?

A. I think Mr. Elbert told me that——

Q. I say: you knew in your own mind that it was a false ticket; is that right, or a false bill?

A. I don't know whether he intended to deliver the merchandise [58] or not.

Q. But as far as you know, you don't know whether he intended to or not? A. No.

Q. I see, and then he came back with these other tickets?

A. Yes, he did, in the afternoon.

Q. That was later, but this ticket was brought in when he first came in? A. No.

Q. Or shortly afterward?

(Testimony of William L. Kieffer.)

A. I think he prepared it while he was in the office.

Q. And didn't you know that it was a false ticket?

A. No, I can't say that it was false.

Q. But you knew that he was preparing a false ticket, didn't you?

A. No. I knew he was preparing a ticket.

Q. You didn't know that; you thought it was an honest ticket?

A. I don't know whether it was false or honest. I can't say.

Q. You are with the F.B.I. and didn't know whether it was a false or honest ticket. That is all.

Redirect Examination [59]

Q. (By Mr. Hepp): What did you know about this ticket, Lt. Kieffer?

A. As Mr. Elbert told me, he stated that——

Mr. Hurley: I object to what Mr. Elbert told him as hearsay, incompetent, irrelevant, and immaterial. He says he doesn't know whether it was false or good, and this is hearsay.

Mr. Hepp: In counsel's question he asked: "You knew this was a false ticket?" I have a right to ask him a corresponding question on the same subject matter. Counsel is the one that brought that up. I didn't.

Mr. Hurley: He has no right to ask for hearsay testimony.

The Court: It is hearsay evidence. I will sustain the objection.

(Testimony of William L. Kieffer.)

Mr. Hepp: All right.

Q. (By Mr. Hepp): Just yes or no, Lt. Kieffer: did you have a conversation with Paul Elbert that morning, that is, the morning of October 10th?

Mr. Hurley: I object to that as immaterial. He may have talked to 100 people.

The Court: Objection overruled.

Q. (By Mr. Hepp): Will you answer the question, please? A. Yes, I did have.

Q. Just yes, or no, please. Did that conversation relate to this defendant? [60]

Mr. Hurley: I object to that as incompetent, irrelevant and immaterial, calling for hearsay testimony.

The Court: Objection overruled.

A. Yes.

Mr. Hepp: That is all.

Mr. Hurley: That is all

(Witness excused.)

Mr. Hepp: Call Mr. Shockey, please.

WARREN SHOCKEY,

a witness called by the plaintiff, after being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Hepp): Would you state your name to the jury, please?

A. Warren Shockey.

Q. By whom are you employed, Mr. Shockey?

A. I am employed by the Air Force.

Q. And what is the line of your work?

(Testimony of Warren Shockey.)

A. I work in the Comptroller's Office, in the Statistical Services Section.

Q. Where were you employed during the month of October, 1951?

A. I was employed at Ladd Field in the Comptroller's Office.

Q. Are you familiar with an organization known as the [61] Civilian Mess Hall of Ladd Air Force Base? A. Yes, sir.

Q. Do you know the defendant, Mr. Lemke?

A. Yes, sir.

Q. How long have you known Mr. Lemke?

A. I would say from about August 15 on, August 15 of 1951.

Q. Are your duties in the Comptroller's Office in any way connected or involved or do they form a part of the business transactions of the Ladd Air Force Mess, or the Civilian Mess, I should say?

A. No, sir, there are two separate jobs. My primary job is with the Air Force. This bookkeeping job is a sort of a part-time job, just taking care of the accounts for the Civilian Club and Mess.

Q. Do you take care of those accounts?

A. Yes, sir.

Q. How long have you taken care of those accounts? A. Since August 15th.

Q. Do you know of your own knowledge whether or not the defendant was ever connected, affiliated, or associated with the Civilian Mess Hall at Ladd?

A. At the time I took over the duties of bookkeeper he was the Manager of the Mess Hall.

(Testimony of Warren Shockey.)

Q. Are you familiar with the type or manner of business transactions, or the manner of the conduct of the business of the Civilian Mess Hall? [62]

A. Yes, sir.

Q. Assuming, of course, that certain commodities are purchased for the functioning of this mess hall, do you know the manner in which merchandise is paid for?

A. At the time I assumed the duties, the bookkeeper prior to me briefed me on the manner in which they handled their business and in the manner it was paid. They are all paid for by check.

Q. Would you just for instance trace merchandise into the mess hall and any writings or other transactions that occur through that transaction to payment for the merchandise? Would you tell the jury the conduct of that business?

A. The material or food purchased for the mess hall was purchased by the manager. During the month any merchandise he purchased he received an invoice for and signed his name to it, and then, at the end of the month, presented me with the invoice and I checked those against the statements, if any, of the business houses rendered us one. If not, I added the total of the individual invoices and wrote a check for that amount.

Q. Then, if Mr. Lemke, as manager, had purchased anything and submitted to you a signed voucher, that is, a voucher signed by him, you would have payment issued; is that what you said?

Mr. Hurley: I object to that as incompetent, ir-

(Testimony of Warren Shockey.)

relevant [63] and immaterial, and assuming something in evidence that hasn't been proven.

Mr. Hepp: Your Honor, I am merely trying to straighten out this point. I believe that is what this witness said.

Mr. Hurley: No evidence as to any vouchers in this case was ever submitted.

The Court: I think you better reframe your question and keep it within the testimony that has been given, or if you want to take up another point, ask it in the form of a question.

Mr. Hepp: I will cover it, your Honor, in perhaps a different manner.

I would like to have this packet of four sales slips identified, Mr. Clerk.

Clerk of Court: Government's Identification No. 2.

Q. (By Mr. Hepp): Mr. Shockey, I show you Government's Identification No. 2, appearing to be some pieces of paper stapled together, and ask you to examine them thoroughly, and after you have examined them, state if you know what they are, please.

A. These are sales slips or invoices issued to the Civilian Club and Mess by Paul Elbert for vegetables purchased for us, or they are signed by Mr. Lemke.

Q. Are you acquainted with Mr. Lemke's signature? A. Yes, sir.

Q. Does his signature appear on those invoices or sales [64] slips? A. Yes, sir.

(Testimony of Warren Shockey.)

Q. Incidentally, in a general sense, is there any difference between the word "invoice" and sales slip" as used in bookkeeping channels?

A. No.

Q. They are synonymous for all practical purposes? A. Yes, sir.

Q. Tell me, Mr. Shockey, had you ever seen those sales slips before, or invoices? A. Yes, sir.

Q. And how did that come about?

A. They were given to me at some time during the month and I entered them in our purchase record and was getting ready to make payment on them. This is, I think, even my adding machine tape here on them.

Q. Did this come to you in the ordinary course of doing business?

Mr. Hurley: I object to that as calling for a conclusion, ordinary course of business. He can tell the facts, but to draw a conclusion is not proper.

The Court: Objection sustained.

Q. (By Mr. Hepp): Did you receive those invoices in any different manner than you received the other invoices? [65]

Mr. Hurley: I object, if the Court please. It isn't a question of comparison. It is a question of how he received them.

The Court: I sustain the objection.

Q. (By Mr. Hepp): How did you receive those slips, Mr. Shockey?

A. They were given to me by Mr. Lemke along with other invoices during the month's business.

Q. And I have now forgotten what you said in

(Testimony of Warren Shockey.)

the course of business, what happens after you get these invoices about payment on them.

Mr. Hurley: Well, now, I object. It isn't a question, Your Honor. He says he has forgotten what he said about something that he hasn't testified about. I insist that he ask a question so I have a right to object. I don't know what he is going to testify to under that kind of a suggestion.

Mr. Hepp: I will rephrase the question.

The Court: I think you should show, too, that the defendant knew of this custom or this business procedure.

Q. (By Mr. Hepp): Now, Mr. Shockey, to your knowledge, was it customary that Mr. Lemke, as the manager of the Civilian Mess, gave to you receipted invoices of sales he had made during the month?

Mr. Hurley: I object to that as incompetent, irrelevant and immaterial, and assuming something that is not in evidence. [66] There is no evidence that Mr. Lemke ever made any sales.

The Court: Objection overruled.

Mr. Hurley: He never sold anything.

Mr. Hepp: Would you answer the question, please?

A. No, Mr. Lemke did not give me the receipts slips for sales. That was passed on to me by Mr. Wardman, the custodian.

Q. (By Mr. Hepp): I don't know whether I misstated it or you misunderstood. I am speaking about purchases—the sales made to the Civilian Mess Hall.

(Testimony of Warren Shockey.)

A. Yes, that was, I believe, the standard procedure before I took over that Mr. Lemke passed on——

Mr. Hurley: I object to this hearsay testimony as to what happened before he took over as pure hearsay.

Mr. Hepp: We will start all over again.

Q. (By Mr. Hepp): At the time you received these bills, did you receive other bills setting forth purchases made by the Civilian Mess for those operations from Mr. Lemke? A. Yes, sir.

Q. At the time when you received these bills, did the bills for purchases come ordinarily in the course of business from Mr. Lemke to you?

A. Yes. [67]

Q. What do you do with those bills, those receipted invoices, when they come to you?

A. I check them for mathematical accuracy, enter them in the purchase record for the Civilian Club and Mess, and see that they are charged to the proper account, and then pay them.

Q. Once you have received, for instance, those particular bills there that you have in your hand, is there anything remaining for Mr. Lemke to do that is a prerequisite to payment? A. No.

Mr. Hurley: I object to that as incompetent, irrelevant and immaterial and calling for a conclusion.

The Court: Objection overruled.

Mr. Hepp: What was your answer?

The Witness: No.

Q. (By Mr. Hepp): Once you get those bills,

(Testimony of Warren Shockey.)

payment issues or not from your office, is that right? I mean it isn't dependent upon any further action of Mr. Lemke? A. No, it isn't.

Q. Did you pay these bills, Mr. Shockey?

A. No, I did not.

Mr. Hepp: You may question the witness.

Cross Examination

Q. (By Mr. Hurley): You say these bills were presented to you in your [68] capacity as bookkeeper; is that right? A. Right.

Q. And did Mr. Lemke ever attempt to get any money that you know about of your own knowledge?

A. No.

Q. No, and did Mr., what's his name, the farmer —wait a minute, I will find it in a minute.

Mr. Hepp: Paul Elbert.

Q. (By Mr. Hurley): Paul Elbert, did he ever attempt to get any money on these bills that you know of of your own knowledge? A. No.

Q. Nobody ever attempted to get money on them; is that right, as far as you know, and you never paid any money on them; is that right?

A. No, no money was paid on them.

Q. And nobody attempted to get any data?

A. No.

Mr. Hurley: That is all right. That is all I wanted to know.

Mr. Hepp: That is all.

(Witness excused.)

Mr. Hepp: Your Honor, I am not going to call

any more witnesses, but I would like permission to recall this last witness and ask him two questions and I can save quite a bit of time. [69]

The Court: Very well.

Mr. Hepp: Will you take the stand again, Mr. Shockey?

WARREN SHOCKEY,

a witness previously called by the plaintiff and sworn, was recalled and testified further as follows:

Redirect Examination

Q. (By Mr. Hepp): Mr. Shockey, referring again to these identifications, this Government's Identification No. 2 being these sales slips, I believe you stated that you had not paid them. Will you state to the jury why you didn't pay them?

Mr. Hurley: I object to that as incompetent, irrelevant and immaterial. It doesn't have anything to do with it. His personal reason has nothing to do with the evidence in this case.

Mr Hepp: Your Honor, I don't think this calls for a conclusion.

The Court: Objection overruled.

Mr. Hurley: Save an exception.

A. The bills were entered in the record and ready for payment and Mr. Wardman, the Civilian Personnel Officer is also——

Mr. Hurley: I object to what somebody else told him. They are trying to bring in hearsay testimony, and I object to it.

The Court: Were you directed by your superior not to pay them? [70]

(Testimony of Warren Shockey.)

The Witness: That is right. Mr. Wardman is my superior.

The Court: Very well.

Mr. Hurley: Same objection.

The Court: Overruled.

Q. (By Mr. Hepp): But for the orders from your superiors not to pay these bills, would you have paid them?

Mr. Hurley: I object to that as incompetent, irrelevant and immaterial and calling for a conclusion. Nobody ever demanded payment on them, he said.

Mr. Hepp: Your Honor, I don't believe that that is a part of this evidence.

Mr. Hurley: Nobody ever asked for it, according to his own testimony, neither the defendant nor the other man ever asked for payment, and he testified to that. What he would have done doesn't have anything to do with the case.

The Court: Now, then, wait. Ask your question again, will you?

Q. (By Mr. Hepp): But for the order from your superior not to pay these particular bills here, would you have paid them?

Mr. Hurley: I object to that as purely speculative, incompetent, irrelevant, and immaterial. It doesn't make any difference whether he would or wouldn't, so far as that is concerned.

Mr. Hepp: I believe, Your Honor, it is directly to the point. [71]

(Testimony of Warren Shockey.)

The Court: I think you went into that same question before when you had him on the stand. I will sustain the objection. Just a repetition.

Mr. Hepp: I don't recall having gone int it, Your Honor.

The Court: You asked him if there was anything further to be done by Mr. Lemke, yes.

Mr. Hepp: This present question is whether or not payment would have issued on this but for instructions not to, and I believe I can come forth with an offer if the Court will listen.

The Court: All right, I will listen.

(Thereupon counsel approached the bench, and the following ensued):

Mr. Hepp: I desire to show with this witness that payment in this case would have issued automatically but for the stop, that he knows of no reason in this case why payment would not have been made except for the instructions; so that they would otherwise have been paid but for the stop, and that is the interference or the interception which is ordinarily considered necessary in showing an attempt. I believe this deals directly with that point, that payment would have issued automatically but for the payor being instructed not to pay. I would like to show that there was no other reason but that instruction that stood between the payment of this.

Mr. Hurley: In the first place, I object because it [72] is not the best evidence and it is hearsay and it is incompetent, irrelevant, and immaterial, be-

(Testimony of Warren Shockey.)

cause what somebody instructed him is not evidence. If there is a man that had power to do that, his testimony is the best evidence.

Mr. Hepp: This is the man, Your Honor.

Mr. Hurley: And what this man says somebody told him is not material in this case and his reason for not paying is a conclusion.

Mr. Hepp: I am not asking for what was told to this man. I am asking if payment would have issued but for this instruction.

The Court: I will sustain the objection. I think you have gone into that question.

(The discussion at the bench was concluded and counsel resumed their seats in the court-room.)

Mr. Hepp: You may question the witness.

Recross Examination

Q. (By Mr. Hurley): You received these tickets, did you? A. Yes, sir.

Q. And were any of them ever paid?

Mr. Hepp: I believe that is repetitious.

Mr. Hurley: I am cross-examining.

Mr. Hepp: Counsel has gone into that.

Mr. Hurley: I have never asked him the question: Were these tickets paid? [73]

A. Those four tickets, no.

Q. (By Mr. Hurley): No; neither to Mr., what's his name, Paul Elbert?

Mr. Hepp: I object to that.

Q. (By Mr. Hurley): Nobody ever——

(Testimony of Warren Shockey.)

The Court: What is your objection?

Mr. Hepp: My objection is that if the tickets weren't paid, then he could name off 100 people. If the tickets weren't paid, it is repetitious to name any names.

The Court: It is repetitious. I will sustain the objection. Objection sustained.

Mr. Hurley: I can't ask him——

The Court: It is repetitious. You have asked him the same thing over and over.

Mr. Hurley: I never asked him that before, Your Honor.

The Court: I won't argue with you on that, Mr. Hurley. I have ruled on that.

Q. (By Mr. Hurley): Did you ever give Mr. Lemke or Mr. what's his name——

Mr. Hepp: Elbert.

Q. (By Mr. Hurley, continuing): ——Paul Elbert, any money in connection with this deal?

A. No. I don't give out money.

Q. Did either one of them ever ask you for any money or [74] try to get any money on this deal?

A. When a statement is given, or statement——

Q. I am not asking you that.

Mr. Hepp: I object.

The Court: You asked him a question and then you interrupted his answer. What was your answer?

Mr. Hurley: I want a direct answer.

A. When an invoice is given to me——

Mr. Hurley: I object to the answer because it is not responsive and I move it be stricken out.

(Testimony of Warren Shockey.)

The Court: Will you be quiet just a moment and let him answer. Say that again.

A. When an invoice is given to me, I assume that it is for payment for the materials that were purchased by the club.

Mr. Hurley: That isn't what I asked him, Your Honor. I asked him if either Mr. Elbert or the defendant ever tried to get any money on these slips.

The Court: He is telling you that they did by presenting the bills.

Mr. Hurley: I understand he says that they presented the bills, but I am asking if anyone ever came and tried to get any money.

The Witness: Neither man personally asked me for money.

Q. (By Mr. Hurley): Neither one tried to collect anything; is that right? [75]

Mr. Hepp: I object to that. That is a conclusion of law.

The Court: Objection sustained.

Mr. Hurley: Save an exception.

Q. (By Mr. Hurley): Did Mr. Lemke ever come to you and tell you that he had a claim on this money? A. No.

Q. Did Mr. Elbert ever come to you and tell you that he wanted this money and wanted you to pay him? A. No.

Mr. Hurley: I see. That is all.

Redirect Examination

Q. (By Mr. Hepp): Well, now, Mr. Shockey,

(Testimony of Warren Shockey.)

what other bills you get, do the creditors come and the sellers come and ask you for money?

A. No.

Mr. Hurley: Just a minute. I object to that as incompetent, irrelevant, immaterial, and not proper redirect-examination.

The Court: Objection overruled.

Mr. Hepp: Would you answer the question?

A. No, I wasn't asked personally for money in payment of any bill.

Q. (By Mr. Hepp): Do you hand over the money? [76]

A. No. I only write the checks.

Q. Is it your policy to wait for a request from somebody before you issue payment on the obligations of the club?

A. No, I pay the following month for all obligations made by the club in the preceding month.

Q. And that is independent of any request that may or may not have been made to you concerning a particular bill? A. Right.

Mr. Hepp: That is all.

Recross Examination

Q. (By Mr. Hurley): You pay by check; is that right? A. Yes.

Q. Did you ever write a check for any of these bills? A. None of those four.

Q. You never wrote a check?

Mr. Hepp: I object to that. That is repetitious.

The Court: Objection sustained.

(Testimony of Warren Shockey.)

Q. (By Mr. Hurley): Nobody ever got any money on them as far as you know; is that right?

Mr. Hepp: Can I argue my case, too?

The Court: You may make any objection that is warranted.

Q. (By Mr. Hurley): I say: nobody got any money on those four slips, as far as you know? [77]

Mr. Hepp: I object to the question as repetitious and I ask that counsel's remark——

The Court: Objection sustained.

Mr. Hurley: Save an exception.

Mr. Hepp: That is all.

(Witness excused.)

Mr. Hepp: At this time I would like to offer for admission Government's Identification No. 1, having been identified as the sales book that Mr. Elbert used in the transaction before the court.

Mr. Hurley: I object to that as incompetent, irrelevant and immaterial, no proper foundation laid.

The Court: Objection overruled. It may be admitted.

The Clerk: Government's Exhibit A.

(The sales book previously marked Government's Identification 1 was received in evidence as Government's Exhibit A.)

Mr. Hurley: Save an exception.

Mr. Hepp: I offer for admission Government's Identification No. 2, being the sales slips identified as having come from the defendant to the book-

keeper for payment concerning the transactions set forth in Identification No. 1.

Mr. Hurley: Same objection, Your Honor.

The Court: Same ruling.

Mr. Hurley: Exception.

The Clerk: Government's Exhibit B. [78]

(The four original sales slips of Paul Elbert's, signed R. G. Lemke, previously marked Government's Identification 2, were received in evidence as Government's Exhibit B.)

Mr. Hepp: I will rest the Government's case, Your Honor. I wonder, it is really time for a recess—may I withdraw my rest and ask for a recess?

The Court: Yes. We will take a ten-minute recess.

The Clerk: Court is recessed for ten minutes.

(A ten-minute recess was taken.)

The Clerk: Court is reconvened.

The Court: Will counsel stipulate all members of the jury are present?

Mr. Hurley: We do, Your Honor.

Mr. Hepp: We stipulate.

The Court: Very well.

Mr. Hepp: I will rest the Government's case, Your Honor.

The Court: Very well.

Mr. Hurley: And I will rest the defense, too. I would like to make an argument and a motion, Your Honor, before submitting the case finally. It will probably take me 40 minutes to present what I want to present.

The Court: Very well, then.

(Whereupon, at 4:00 p.m., the Court duly admonished the jury and the jury was excused until ten o'clock the next morning.) [79]

Mr. Hurley: And I would like to have a recess for about ten minutes in order to get the books in shape, if you have no objection, Your Honor.

The Court: Very well, I will take a recess until a quarter past.

Mr. Hurley: That will be fine, Your Honor. I can get them in that time.

The Clerk: Court is recessed until quarter after four.

(Thereupon a recess was taken.)

The Clerk: Court is reconvened.

The Court: Are counsel ready to proceed?

Mr. Hurley: Yes, we are, Your Honor.

The Court: Very well.

Mr. Hurley: I made a motion for a directed verdict, and in lieu of that a motion to dismiss the case, as I understand it, and in support of those motions I want to call the Court's attention to two things. The first is this: that under the law as laid down in the statute any person who attempts to obtain money by a false token is guilty. In this case they claim they have proven a false token, but not one witness on the stand ever testified that either the defendant or his accomplice ever attempt to get the money. Now, this is a crime which took two persons, according to the Government's evidence. There had to be a man that presented a false bill which had to be

O.K.'d by the defendant. Then he had to present it and collect the [80] money to complete the crime, and there isn't a thing in the statute that says that the preparation and presentation of a false token is a crime; not a thing in the statute. It is made a part of the crime of attempting to obtain money by false pretenses. There has got to be a false token under the false pretenses statute, and there has to be an attempt to get the money. And their witnesses all swore that nobody attempted to get any money on this deal. That is the evidence. They never attempted to get any money. The defendant didn't attempt to get any money. The only way he could get money under this deal, according to the star witness, was to have had assignment or an order whereby he could get payment, but there is no claim of that kind. So the only man that could have gotten the money was their star witness, and he never tried to get any money. He never attempted to get any money. He never attempted to carry out what he claims the contract was between him and Mr. Lemke, so there was no attempt to get money under the law.

According to their testimony, they entered into a false token. Mr. what's his name prepared a false bill. Mr. Lemke O.K.'d it, and it went to the office. That is their evidence, but they never paid it. Nobody attempted to get the money. They knew it was false, apparently, according to their testimony, so this was a deal that required two people. One man couldn't commit the crime. The first thing, to commit the crime, there had to be a man like this farmer make out a false [81] bill. It had to be O.K.'d by

Mr. Lemke. Those two things they have proved, that is, there is evidence to prove those two things—and then went some place, I don't know, but they all swore that neither Mr. Lemke nor the man that prepared the false bill ever tried to get any money on the transaction and the indictment says they attempted to obtain money by a false pretense. You can't convict a man for making a false pretense. There is nothing in the statute that says you can do that. You have got to convict him of attempting to obtain money. and this fellow says there was an agreement between him and the defendant. He was the crook with the defendant according to his own testimony.

That brings up another question. You can't convict a man on the uncorroborated testimony of an accomplice. That is well settled. I have had it before Your Honor. I don't even need to refer to it. But here we are. This man comes in and says he signed a false bill and this man O.K.'d it, and his is the only evidence that the food wasn't delivered according to the bills, and he admits he was an accomplice. If he wasn't, there could be no crime, because he had to get the money. That was the deal between him and Mr. Lemke, according to his testimony; he and Mr. Lemke were going to divide $60, and naturally one was an accomplice of the other. There is no evidence of any kind, Your Honor, that tends to prove this defendant is guilty under the broadest interpretation of the law, except the testimony of the accomplice, and you can't convict a man on that kind [82] of testimony.

The other man they brought in said yes, the bill was presented and we would have paid it, but we

don't know it is a crooked bill, and Mr. Lemke and the other man never tried to get the money. That was their evidence.

So there are two reasons, Your Honor, why you can't convict this man on this kind of a charge. This has been up before on attempts.

I want to read a case here that was decided in American Jurisprudence. "The subject of attempts is treated——"

The Court: What book and page are you reading from?

Mr. Hurley: This is 22 American Jurisprudence, on page 487. It says:

"As heretofore stated, criminal liability may be predicated under false pretense statutes against one who has obtained property by a false representation in respect of the ownership of real property sold or mortgaged by him. Statutes have been enacted in many jurisdictions expressly prohibiting the sale of land by a person who knows that he does not have title, and also prohibiting the sale of land twice. Other jurisdictions have enacted statutes making it criminal to conceal prior conveyances and encumbrances on real or personal property. In order to justify a conviction for the statutory offense of selling land twice, it is essential to prove the first and second sales as specified in the statute, and that the second sale was for a valuable consideration and was made fraudulently—that is, with intent to defraud either the first or second purchaser. The second sale is not deemed fraudulent if made pursuant to the request of a purchaser."

Then the next section, which is Section 80, provides:

"The subject of attempts is treated generally in another article, but the specific application of the general rules therein discussed to the crime of attempting to obtain money by false pretenses and to other allied offenses is treated here."

The general law, of course, we know our general attempts section, but this has to do with attempts to obtain money by false pretenses.

"The crime of attempting to obtain money or property by false pretenses is complete wherever the false representation is made with the requisite criminal intent under circumstances such that if the ruling of value is obtained, a deprivation is the result; and a conviction for such an attempt may be had, even where the accused has received part of the thing of value which he sought. There is authority, however, to the effect that where one obtains the money or property sought to be procured, he cannot be convicted of an attempt under a statute making the completed crime and the attempt to commit it separate crimes." [84]

In other words, the mere making of a tender, Your Honor, is not sufficient under our statute in itself. The mere making of a false token under our statute doesn't constitute a crime. They have proven a false token but every one of their witnesses testified that nobody attempted to get any money, and that is the gist of the crime, and you can't convict a man for making a false token. Nothing in this statute says that a man who makes a false token

whereby another man might acquire money commits a crime. There is certainly nothing under the false pretenses statute. Something must be done to complete the crime, and according to their own testimony, all they have got is that one man made a false bill, the man signed the false bill, and there is no evidence that anybody ever collected the money. There is evidence it was turned in, but here is the point: it will take three things to make a crime. The first thing, this man had to make out a false bill. Mr. Lemke had to sign the false bill. Then he had to present it and make an attempt to get the money, either get it or attempt to get it, to make a crime complete, and those things were not done. According to the evidence, he made out a false bill, and Mr. Lemke signed it, but there is no evidence that anybody tried to collect the money, and the gist of the crime is an attempt of collecting. If it is a false pretense, he has to collect. If it is an attempt, he has to try to get the money, and that is the evidence in this case, and it is just as clear as it can be. And furthermore [85] in this case who gives the evidence? This man out here, and he is an accomplice. This is a crime that couldn't be perpetrated by one man. He had to have another man working with him and they had to join, and the only evidence that the defendant ever did anything criminal is the evidence of the accomplice. There is no evidence by anybody else. Nobody else testified the food wasn't delivered. Nobody else testified that there was a false bill; just the man that was his accomplice in the deal, and you can't convict a man on the un-

corroborated testimony of an accomplice. The mere fact that he says he is honest doesn't change the fact, as far as an accomplice is concerned. He was an accomplice or else there was no crime. If he had no intent to commit a crime, there was no crime committed. You can't impute an intent to one man who is a party to a crooked deal if there is no criminal intent. It is just as plain as can be. It is fundamental law. And there is no evidence in this case that tends to connect the defendant with the commission of the crime. It is the testimony of an accomplice. You can't make anything else out of it, because if he is not an accomplice and he never committed a crime, then this man couldn't commit a crime, because it took two acts by him and one act by the defendant, so if no crime was committed, there is no crime. If there was a crime committed, you have got to convict on the uncorroborated testimony of an accomplice, and that is all there is, as far as I see. [86]

Mr. Hepp: May it please the Court——

The Court: Mr. Hepp.

Mr. Hepp: ——and Mr. Hurley: I think we have gone into the subject matter of attempts on previous motions. I don't have the authorities with me now I have used in a previous argument. I believe the law is well settled, Your Honor, that while there are some holdings that may possibly be peculiar to the attempt aspect of the false pretenses statute, the old common law statute of cheat, it is basically the same thing as an attempt in any other crime and is spelled out in our statutes under the section entitled

"Attempts." But the law is now and has always been, Your Honor, that any overt act done with an intention of consummating a crime comprises an attempt, and it doesn't really matter whether it was intercepted or interfered with or prevented or didn't come up to the expectations of the perpetrator in this instance in tracing this payment through. There is this false token that was signed. That satisfies the statutory requirement under our statutes, and the witness testified, and, Your Honor, it is uncontradicted before this Court, that this defendant gave these slips to the bookkeeper. And the bookkeeper testified that payment would normally issue, something of an automatic proposition, in which there was no further act by the defendant to do. I can't conceive of what he could have done to make an attempt if this wasn't an attempt, because there was nothing more the defendant [87] could have done in any event to consummate the crime, including the overt act of submitting these slips of paper for payment.

The law seems well settled that a person can either accept or request something to be paid to him or to someone in his behalf or with an understanding that it does come back to him.

Your Honor has heard the evidence in this case. The defendant submitted these bills. They normally would have been paid and the money sent to Elbert but for the fact that the law was in there and Mr. Elbert went to that law. Certainly the defendant went way past the matter of attempt.

If he had just approached Mr. Elbert in this kind

of a transaction and it had stopped there, maybe he might be in better shoes in Court, but that is not the case. He actually signed the receipts and put his plan into operation as far as he was capable.

This argument of an accomplice is so silly, I hardly know how to respond to it, Your Honor. A person doesn't get wind of something and go straight to the police and have tickets marked as they were in this case if he is an accomplice. Certainly a person is not an accomplice unless he could be convicted. It is scarcely worth arguing about. I don't know that it matters. I can't see the relevancy of an intent on Mr. Elbert's part. That doesn't bear upon it. He is not on [88] trial here. The point is whether this defendant committed a crime.

I am going to ask the Court to overrule these motions and I would like to make a motion that the Court direct a verdict of guilty, inasmuch as the authorities are well agreed that when evidence is uncontradicted and bears out in every respect the guilt of the defendant, that there is no issue of fact to be decided by the jury, and the Court is the proper person at that time to dispose of the case, and I am going to move at this time that the verdict be directed, that is, a verdict of guilty be directed, inasmuch as the elements are shown here, which stand uncontradicted, which spell out a criminal act under our statute.

Mr. Hurley: If the Court please, I would like to read a decision here in American Jurisprudence on the same page that I referred to. It says, "Where a jury——"

The Court: Give us the book and page, please.

Mr. Hurley: It is in 22 American Jurisprudence, on page 488. I think it is very much in point. It says here:

"Where a jeweler who had insured his stock in trade against burglary, with the object of obtaining the policy money from the insurers, falsely represented to the police that a burglary had been committed on his premises and the jewelry stolen, in the hope that the police would make a report by which the insurers might be induced to pay, but where, before he had made any communication about the pretended burglary to the insurers, the fraud was discovered, and he was arrested, it was held that he could not be convicted of an attempt to obtain money from the insurers."

It takes something more than an overt act. Here was the man that insured his property and probably burned it and he wanted to collect the insurance money and so he told the policeman and he never made any claim himself. He never made any attempt to claim any money himself, and they said it isn't an attempt to obtain money by false pretenses just because he told somebody else something. That is the law. It is well settled, Your Honor.

I am sorry I am not better prepared. There are a lot of cases on the point, but it seems to be well settled that there has got to be an attempt to get the money by either the defendant or somebody connected with the defendant. You can't have a conviction of obtaining money by false pretenses under a false token. The very statute itself is against that.

It says any person who attempts to obtain, and by a false token, but that is just secondary. It doesn't say that anybody that makes a false token can be convicted. It says a person who attempts to obtain, and all their witnesses testified that neither the defendant nor the man that was involved with him in the commission of this deal ever attempted to get the money or got it, and you can't convict them of obtaining money by [90] false pretenses or by a false token when they made no effort to get the money.

According to their evidence the defendant signed a false bill made out by this man. That is their evidence. That in itself is not a crime. There has to be something by that man, some overt act by that man, not by the defendant, unless he has an assignment or an order to pay to him, and there is no claim of that kind, but there had to be an overt act by either the man that made the false bill or the man that sold it, according to their own evidence, and they swear nobody did, so there was no attempt made to obtain money according to their own evidence. They made no attempt to obtain any money, neither the man that made the false bill according to their evidence, nor the man that signed the false bill.

Not only that, the only evidence in this case that ties this defendant with anything wrong is the testimony of an accomplice. He is either an accomplice or he is nothing, because he admitted he entered in this scheme, so he is an accomplice. And there is no evidence other than his that the defendant didn't

deliver what he was supposed to deliver, that the bill wasn't honest. We don't know what the deal was, but that is the evidence, and the only evidence is the evidence of an accomplice.

The Court: An accomplice is usually defined as a person who could be prosecuted for the same crime that the defendant [91] is on trial for, so I don't think that we have the question of an accomplice in this case at all, because Paul Elbert was designedly or very clearly not intending to commit a crime and not doing the acts which would constitute that crime. He had informed the O.S.I. officials, so that anything that he did would not result in the commission of a crime. So I think we have the question of an accomplice out of this case, and if it were in the case, in all likelihood the signing of this receipt by the defendant in this case would be sufficient corroboration anyway.

Now, as to an attempt, it seems to me that the evidence shows a very decided attempt to cash in on these false pretenses. He presented the bill. That is an attempt, in itself, to get the money on it. That is trying to get the money. When you hand a man a bill, that is trying to get the money. That is what he did here. He handed in the bill signed by him, made out by Paul Elbert, and signed by the defendant, and then he presents it to the bookkeeper. That is an attempt in itself. So the motions of the defendant are denied.

I don't think that the motion by the District Attorney is well taken either, so it will be denied, too.

Mr. Hurley: I might want to produce some evi-

dence, Your Honor. I am not sure. I don't imagine I will, but I might like to. It won't be long if I do.

The Court: This case is adjourned until tomorrow at ten.

(Thereupon, at 4:50 p.m., an adjournment was taken until ten o'clock the following morning.) [92]

February 27, 1952, 10:00 a.m.

Be It Remembered, that upon the 27th day of February, 1952, the trial of this cause was resumed, plaintiff and defendant represented by counsel, the Honorable Harry E. Pratt, District Judge, presiding:

The Court: Call the roll of the jury.

(Whereupon, the Clerk of Court proceeded to call the roll.)

The Clerk: They are all present, Your Honor.

The Court: Are counsel ready to proceed?

Mr. Hurley: We are ready, Your Honor.

The Court: Very well.

Mr. Hurley: Call Mr. Lemke.

RALPH G. LEMKE,

the defendant in this cause, took the stand in his own behalf, and after being first duly sworn testified as follows:

Direct Examination

Q. (By Mr. Hurley): Your name is Ralph G. Lemke? A: That is right, sir.

Q. And you are the defendant in this action?

A. Yes, sir.

(Testimony of Ralph G. Lemke.)

Q. Were you employed at the Civilian Club and Mess at Ladd Air Force Base? A. Yes, sir.

Q. When was that, Mr. Lemke? About what time were you employed? [93]

A. I was employed about June 10th to October 24th.

Q. You worked there continuously from June 10th until October 24th; is that right?

A. Yes, sir.

Q. I see, and are you acquainted with Paul Elbert? A. Yes, sir.

Q. How long have you known him?

A. I have known Paul Elbert about four years.

Q. Did you ever have any business dealings with him?

A. Yes, I had occasional business dealings with him.

Q. And in what capacity were you employed at the mess hall out there?

A. I was employed as mess manager.

Q. What did they pay you for your work, what wage? A. Five hundred dollars a month.

Q. What?

A. Five hundred dollars a month.

Q. Five hundred dollars a month?

A. Yes.

Q. And was it part of your duties to secure the food that was used there at the mess?

A. Yes, sir.

Q. Where did you get the food?

A. I bought the bulk of the food from the Army

(Testimony of Ralph G. Lemke.)

Commissary and what I couldn't procure at the Army Commissary I bought from local merchants.

Q. And do you remember when you first bought anything from Paul Elbert, about how long you had been dealing with him prior to the tenth of October, 1951?

A. Well, it was along about in, I believe the first produce starts coming in along about August.

Q. In August? A. Yes, sir.

Q. And what did you buy from him?

A. I bought radishes, celery, cabbage, lettuce.

Q. Did he ever try to sell you anything else?

A. He talked to me about potatoes, and I told him I couldn't buy them at two cents higher than the grocery could sell them to me.

Q. He tried to sell you potatoes at two cents a pound more than you were paying for them?

A. Yes, sir.

Q. What? A. Yes, sir.

Q. And you heard his testimony here yesterday in which he stated that you and he entered into a deal whereby you were to try to beat the mess out of $60 for produce that was never delivered. Did you ever enter into any kind of a deal like that with him? A. No, sir.

Q. Did you have any reason, so far as your dealings with him were concerned, to believe that he was a crook? [95]

Mr. Hepp: I object to that, Your Honor. That is calling for purely a conclusion. He can state what his dealings were and let the jury decide.

(Testimony of Ralph G. Lemke.)

The Court: Objection sustained.

Mr. Hurley: Save an exception.

Q. (By Mr. Hurley): Did you believe that he was honest when you were dealing with him?

Mr. Hepp: I object to that as calling for a conclusion of the witness.

The Court: Objection sustained.

Mr. Hurley: Save an exception.

Q. (By Mr. Hurley): And did he or you ever make a deal in regard to trying to put over a crooked deal to obtain $60 from the Ladd Air Force Mess? A. No, sir.

Q. I call your attention to Government's Exhibit A, I think it is. It is a bill which says, "Paul O. Elbert, 10th month, 10th day, 1951, Civilian Cafeteria, 600 # Cabbage @ 10c a pound, $60.00." Did you ever see that before? Did you ever sign it or see it; was it ever presented to you? A. No, sir.

Q. You never knew anything about it?

A. No, sir. [96]

Q. What? A. No, sir.

Q. Mr. Elbert never came to you with that or showed it to you? A. No, sir.

Q. Now, there have been four pieces of paper introduced in evidence which are marked Exhibit B. One is a slip prepared by Paul Elbert for $20.40. That is dated the 10th of October, 1951. Then there is one dated the 8th of October, 1951, for 200 pounds of cabbage for the Civilian Cafeteria, and another one dated the 9th of October, 1951, for $20 for celery, 100 pounds at 20 cents, and another one on the

(Testimony of Ralph G. Lemke.)

10th of October, 1951, for 200 pounds of cabbage at $20, which has your name on them. Do you remember signing those receipts, those bills?

A. There is the first one there, $20.40, was instructed by me to have Paul Elbert make out a duplicate.

Mr. Hepp: I object to that answer and ask that it be stricken. I think the answer should be responsive. Counsel asked him if he remembers signing them. I don't think that calls for any particular explanation. If he wants to go into those other matters, I have no objection.

The Court: Objection sustained.

Q. (By Mr. Hurley): Do you remember signing these slips? A. Yes, sir.

Q. And the $20.40 dated the 10th day of October, 1951, [97] you say that was in lieu of one that had been issued before?

A. That was in lieu of a slip that the payment was due on in August.

Q. And who called your attention to it?

A. Or September, I beg your pardon.

Q. The bookkeeper?

A. Paul Elbert called my attention to that slip.

Q. Did anybody else connected with the Civilian Mess call your attention to it? A. Yes.

Q. Who?

A. I called the attention of the bookkeeper about it because Paul Elbert said he hadn't been paid for it. He told me he hadn't received it.

Q. He said he had delivered the merchandise and

(Testimony of Ralph G. Lemke.)

hadn't been paid for it? A. Yes, sir.

Q. And you believed him and reported it to the bookkeeper; is that right?

A. Yes, sir; and I talked to the bookkeeper about it and the bookkeeper said the only thing to do was to have Paul Elbert make out a duplicate slip in the amount of $20.40.

Q. You believed he delivered the merchandise, did you? A. Yes.

Q. And took his word for it and reported it to the bookkeeper and the duplicate was made out; is that right? [98] A. Yes, sir.

Mr. Hepp: I object to these leading questions. I move that that question be disallowed.

Mr. Hurley: I am just trying to straighten it out.

The Court: Just the same thing was testified to by Mr. Elbert. No controversy on it.

Mr. Hepp: I am objecting to that aspect of his question that he believed those groceries had been delivered.

Q. (By Mr. Hurley): Did you believe they had been when you fixed out this duplicate receipt?

A. Yes, sir; I had no reason to believe that he never did deliver anything in the amount of time that I did business with him.

Q. Here is a slip that is on one receipt. Here is the second one on Exhibit B, dated the 8th day of October, 1951, and calls for 200 pounds of cabbage, $20.00, and who presented that statement to you? A. Paul Elbert.

Q. And did you receive that cabbage?

(Testimony of Ralph G. Lemke.)

A. As far as I know I received it. I may have been busy. I never checked all the merchandise when he delivered it.

Q. You believed when——

A. When a man presents a bill to me, I sign it and believe that he delivered it. I don't sign all bills out [99] there. When I am gone other people sign them.

Q. But you just naturally assumed that the merchandise is delivered?

A. When a man tells me he delivered the merchandise and presents a bill for payment, I sign it.

Q. Here is one—was that done on the 8th of October?

A. It was dated the 8th of October. I signed it on the day it was dated.

Q. You signed it on the day it was dated?

A. I check all receipts before I sign them.

Q. When they bring merchandise they date their bills on the day that they present them to you; is that right? A. That is right.

Q. Here is one dated on the 9th of October, the third one of this exhibit, the 9th of October, 1951, for 100 pounds of celery, $20. Did you receive that celery?

A. As far as I know, I received it.

Q. You believed that the celery was delivered, did you, when you O.K.'d this bill?

A. Yes, sir.

Q. And here is one on the 10th of October, 1951, for cabbage, $20, and you signed that, did you?

(Testimony of Ralph G. Lemke.)

A. Yes, sir.

Q. And who presented it to you?

A. Paul Elbert. [100]

Q. And did he represent that he delivered the cabbage? A. Yes, sir.

Q. And you don't know; can you say positively whether or not you received it?

A. On these separate dates, I couldn't remember offhand. I never go back and check them all the time. I had a man that always put this stuff away when it was delivered. I had other important duties, too.

Q. What time of the day was it usually when he came out there with his produce?

A. Oh, he generally got there before noon.

Q. And how many men did you feed out there?

A. In the neighborhood of, I would say, 190 to 240 or 250 meals per sitting.

Q. To each meal? A. Yes, sir.

Q. And you were pretty busy; you superintended the whole business; is that right?

A. Yes, sir. I would go out and see that the steam table was set up in the proper manner, see that the girl had cash. There were times I was left with such a shortage of change I would have to run out and get it. It took up a lot of my time, about 16 hours a day.

Q. Did you ever have any conversation with Mr. Elbert after this trouble arose, in which he claimed you and he were [101] attempting to beat the mess out of money?

(Testimony of Ralph G. Lemke.)

A. I had no direct conversation with him, no.

Q. And did you ever make any attempt to get any money by reason of this transaction?

A. No, sir.

Q. You thought that the bills were proper when you signed them? A. Yes, sir.

Mr. Hurley: That is all. You may cross-examine.

Cross Examination

Q. (By Mr. Hepp): Mr. Lemke, what did you talk to Mr. Eibert about down at the N. C. garage?

A. I merely talked to him about, he asked me in lieu of this $20.40 that he hadn't been paid for, and that was the extent of our conversation.

Q. Now, Mr. Lemke, I believe you have said that you have signed these tickets, those being Exhibit B, $20.40, $20, $20, and $20, being the 8th, 9th, and 10th days of October?

A. They appear to be my signatures, yes.

Q. Well, examine them and state whether they are or not, please.

A. I think they are. I have seen them before.

Q. Are they your signature?

A. Yes, sir. [102]

Q. Now, Mr. Lemke, I am going to ask you to look at Government's Exhibit A, and on the corresponding pages, the duplicate, the yellow sheets of numbers corresponding to these white tickets, and ask you to tell us whether what appears to be a carbon impression is an impression of your signature.

Mr. Hurley: I wonder if I could see that, Mr.

(Testimony of Ralph G. Lemke.)

Hepp. I don't know just what the exhibit is. I would like to see it before you question him on it, if you have no objection.

I object to this as incompetent, irrelevant, and immaterial. He has already admitted he signed the originals. I don't see why he has to prove by this witness that this carbon copy was signed by him. He didn't sign the carbon copy. He signed the original, and that is the carbon copy of his signature.

The Court: What is the purpose of the question?

Mr. Hepp: I would like to come forward. I believe my purpose should be given out of the hearing of the jury.

(Thereupon counsel approached the bench and the following ensued):

Mr. Hepp: I desire to ask this witness as to how it came about that if these are the carbon copies bearing the impressions of his signature that appear on the originals, how they happen to be so staggered in the numbers of the original sheets which have been identified as his signature. Those are loose and not intact, but the carbons are all intact in the book, and there is of course the question in skipping these numbered [103] sheets, that those were signed, and I believe I have a right to ask him to explain how he happens to sign a couple of pages and then skipped a bunch and signed some more, and I can't do that with the originals, so I have got to establish the fact that those carbons bear his signature as having been carbons of the original.

(Testimony of Ralph G. Lemke.)

Mr. Hurley: The book is in evidence, Your Honor, and I don't know why he should be allowed to argue with the witness as to how it was done.

The Court: Objection overruled.

Mr. Hurley: Save an exception.

(The discussion at the bench was concluded.)

Mr. Hepp: Would you read the last question, Miss Reporter?

(The reporter read the last question, as heretofore recorded on page 90.)

Mr. Hurley: Same objection, Your Honor.

The Court: Same ruling.

A. Yes.

Q. (By Mr. Hepp): I observe in this book a number of white originals, after the carbon No. 41, appearing before the ticket No. 48. Would you examine this exhibit and see if you find those white original sheets in between those two entries?

Mr. Hurley: I object to that as incompetent, irrelevant and immaterial and not proper ss-examination. The exhibit speaks for itself. [104]

The Court: Objection overruled.

A. It appears to be my signature.

Q. (By Mr. Hepp): Did you observe white original sheets in between the yellows in between two entries?

Mr. Hurley: I object to that as incompetent, irrelevant and immaterial, and not proper cross-examination.

(Testimony of Ralph G. Lemke.)

Mr. Hepp: Your Honor, that is the same question.

The Court: Objection overruled.

Mr. Hepp: Would you answer the question, please?

A. Yes, I see white slips there.

Q. (By Mr. Hepp): Do you have any explanation of the entry on page No. 48, which has your signature on it, following these white sheets, the originals of which are blank?

Mr. Hurley: We object to that as incompetent, irrelevant and immaterial. No evidence that he kept the book, and there is no reason why he should be required, as the defendant in this action, to explain the actions of Paul Elbert in connection with this transaction.

The Court: Objection overruled.

Mr. Hurley: Save an exception.

A. May I answer that in my own words?

Mr. Hepp: I would like a responsive answer to the question. [105]

A. All right, I will now answer the question. When a man brings a book to me, he has it open always. Never have I ever signed a slip when a man brings in a book closed. When a man brings me the book, it is open on the page I am signing. It is doubled back. He lays it on the desk. I sign it. That is all there is to it. I don't know what is on that piece of paper, when he presents an open book on the page to sign. I have no idea.

Q. (By Mr. Hepp): Do you pay any attention

(Testimony of Ralph G. Lemke.)

to what you sign as a manager? A. Yes, I do.

Q. I believe you have testified that you believed this merchandise to have been delivered, but you don't know; is that right?

A. I never handled the stock. When a man brings a bill, I believe that it is delivered, and my stockroom man handles the stock. It would be a funny thing for a manager to be running around handling boxes and crates and everything else.

Q. Isn't it likewise a funny thing for a person to sign a bill for goods that he doesn't know whether it is received or not?

A. I don't always go and check the merchandise, so far as I know, when the stockroom man says the merchandise is there. [106]

Q. Does he specify which is which, or does he just say, "I received some merchandise, or 20 pounds of cabbage or 20 pounds of celery"; does he break it down?

A. There are times when my dishwasher has signed these slips.

Q. What happened in these particular instances? That is the question.

A. I would like to finish answering the question. I would like to finish explaining.

Q. I am not interested in what your dishwasher does. I am asking you about your signing these receipts yourself.

A. I have checked the merchandise, yes.

Q. Did you check it in these particular instances?

(Testimony of Ralph G. Lemke.)

A. I don't remember whether I checked it in those instances. I was there 14 days longer after this happened. I bought other merchandise, too.

Whether I went back and checked Paul Elbert's merchandise in those instances, I can't tell you.

Q. What would you say your average amount of purchases during the month of October from Paul Elbert ran per day? What would you say it ran?

A. I didn't buy from him every day.

Q. Those days that you did buy from him, I mean, would it be $5, $50, or $500? Would you give us some idea of the amount of produce you bought from him? [107]

A. I could give you some idea of the amount of produce I bought from him in the course of time I done business with him out there, but I can't tell you the amount of produce I bought from him in the month of October or any one month.

Q. Do you have any idea of about how much it runs per day—I mean, how much did you order to feed, as you say, 190 to 240 people?

A. I can't explain that. I ordered just what we needed.

Q. How much would you need, for instance, in celery? How much celery would you order?

A. It depends on how rapidly the cooks used it and what you had on the menu. You can't give an account of how much you are going to use per day.

Q. Tell me this, Mr. Lemke, when Mr. Elbert delivered merchandise that you signed for, the mer-

(Testimony of Ralph G. Lemke.)

chandise for which you, yourself, transacted by receipted signatures, would he list different items on the same slip, or would he make out, for instance, a slip on celery and a slip on cabbage and a slip on cauliflower, or whatever else he sold, or would they all be on one slip?

A. If he delivered celery and cabbage on the same day he would make a slip out for celery and cabbage on the same slip.

Q. I see. You deny that you have seen this No. 38, 600 pounds of cabbage at 10 cents, $60?

A. I have never seen that slip. [108]

Q. You have never seen that?

A. Until it appeared here in this courtroom.

Q. You are aware that page 39, the next page, bears your signature? A. Yes.

Q. Did you know that Paul Elbert had gone to the O.S.I. before he came out to see you on this day?

A. No.

Mr. Hurley: I object.

A. (Continuing): I don't know anything about what Paul Elbert did.

Q. (By Mr. Hepp): In each of these three deliveries, that is, the 200 pounds of cabbage on slip No. 40 on the 8th of October, 100 pounds of celery on slip No. 41 on the 9th, and 200 pounds of cabbage on slip No. 48 on the 10th, in each of those instances, did Paul Elbert tell you he had delivered those goods? I recall in one of those instances, I believe, in response to counsel's question, you stated

(Testimony of Ralph G. Lemke.)

he had told you. I would like to have you clear that up.

A. When a man brings me a bill of this type, I assume that the merchandise is delivered and I sign it.

Q. Did Paul Elbert tell you that he had delivered the merchandise that is represented in each of these three transactions? [109]

A. He never does tell me. He brings the bill in and says the merchandise is here and I——

Q. Isn't that telling you that it is delivered when he says it is here? A. I suppose it is.

Q. Do you have any financial problems in maintaining your family, or did you, on $500 a month?

Mr. Hurley: I object to that as incompetent, irrelevant and immaterial, and not proper cross-examination.

The Court: Objection sustained.

Mr. Hepp: I believe that is all.

Redirect Examination

Q. (By Mr. Hurley): Mr. Lemke, you say you worked until what time for these people?

A. Fourteen days after said tenth day of October.

Q. Until the 24th of October? A. Yes.

Q. Did anybody from the Civilian Mess that you know of come over there and make a check at your place to find out whether this merchandise was delivered or not delivered?

A. No, sir. If this so-called deal as it is explained in this Court ever took place, it was 14 days

(Testimony of Ralph G. Lemke.)

after that they relieved me of duty, and there was nobody there that ever checked on anything. [110]

Q. When did you first hear of this deal that Mr. Elbert was trying to accuse you of attempting to obtain money by false pretenses?

Mr. Hepp: I object to the phraseology of counsel's question, that Mr. Elbert was accusing him of obtaining money under false pretenses. There is no evidence here that he has.

The Court: Objection overruled.

Q. (By Mr. Hurley): When did you first know that? A. On the 24th day of October.

Q. That is when you were relieved out there?

A. Yes, sir.

Q. And they told you that he had made this charge against you?

A. They told me that he had made these accusations against me at that time.

Mr. Hurley: I see; that is all.

Recross Examination

Q. (By Mr. Hepp): Who are "they," when you say they told you?

A. The Custodian of the Civilian Welfare Club, which is commonly known in this Court as the Civilian Mess.

Q. What was his name?

A. Palmer Wardman.

Q. Sir? A. Palmer Wardman. [111]

Q. And he told you you were released because of the accusations of Mr. Elbert?

A. That is right.

(Testimony of Ralph G. Lemke.)

Q. Did he state what those accusations were?

Mr. Hurley: I object to that as incompetent, irrelevant and immaterial.

A. He didn't make it clear, no.

Mr. Hurley: Just a minute. I object to that as incompetent, irrelevant, and immaterial.

The Court: Objection sustained.

Mr. Hepp: May I have just a moment, Your Honor. I have no further questions.

Mr. Hurley: That is all, Mr. Lemke.

(Witness excused.)

Mr. Hurley: The defendant rests.

The Court: Do you have anything further?

Mr. Hepp: I will rest the Government's case.

Mr. Hurley: Could I have about a 15-minute recess, Your Honor?

The Court: Yes, we will take a 15-minute recess.

The Clerk: Court is recessed for 15 minutes.

(Thereupon a 15-minute recess was taken.)

The Court: Will counsel stipulate all members of the jury are present?

Mr. Hepp: We so stipulate, Your Honor.

Mr. Hurley: Yes, Your Honor. [112]

The Court: Very well. Will counsel come forward, please?

(Counsel approached the bench and the following ensued):

The Court: One proposed instruction of plaintiff's I haven't given because I have really covered

it in another instruction. As to the defendant's, the first one that you offer relates to an accomplice, and I don't think that there is a question of accomplice in this case, so I refuse that one on that ground.

Mr. Hurley: Save an exception.

The Court: And the second one I have covered in another instruction.

Mr. Hurley: How about the third one?

The Court: There weren't three.

Mr. Hepp: Your second instruction is qualified by your first.

Mr. Hurley: I had three requested instructions.

The Court: The first two are about an accomplice.

Mr. Hurley: Yes, and the third one—they are both statutory.

The Court: I have covered that third one. My first instruction covers the same thing.

Mr. Hurley: We except to the refusal to deliver Instruction No. 1 and except to the Court's refusal to deliver Instruction No. 2 and we except to the Court's refusal to deliver Instruction No. 3, and, Your Honor, I don't want to be forced to argue this case until I can read the instructions. [113]

The Court: I will give you five minutes.

Mr. Hurley: All right.

The Court: We will take a five-minute recess.

(Thereupon a short recess was taken.)

The Clerk: Court is reconvened.

The Court: Will counsel stipulate all members of the jury are present?

Mr. Hurley: Yes, Your Honor.

Mr. Hepp: We will stipulate.

(Thereupon Mr. Hepp presented a closing argument to the jury, in behalf of the plaintiff.)

(Thereupon Mr. Hurley presented a closing argument to the jury, in behalf of the defendant.)

(Thereupon Mr. Hepp presented a rebuttal argument to the jury, in behalf of the plaintiff.)

(Thereupon the Court read the following instructions to the jury):

INSTRUCTIONS TO THE JURY

Members of the Jury:
You are instructed:

1.

(a) In the Indictment herein the Grand Jury charges: That on or about the 10th day of October, 1951, in the Fourth Judicial Division, Territory of Alaska, Ralph G. Lemke feloniously attempted to obtain from the Civilian Mess at Ladd Air Force Base, Alaska, money, by false token and with intent to [114] defraud, in that the said Ralph G. Lemke, as the authorized agent of the said Civilian Mess, signed and presented for payment in the ordinary course of business, receipts for $60.00 in value of merchandise, which receipts constituted an authorization to the seller, Paul Elbert, for payment of money in the amount set forth thereon, which said merchandise was known by the said Ralph G. Lemke not to have been received by the said Civilian Mess,

it being prearranged that said $60.00 when paid would be divided, $20.00 to the said Paul Elbert and $40.00 to the said Ralph G. Lemke, contrary to the provisions of Section 65-5-81, Alaska Compiled Laws Annotated, 1949.

(b) You are instructed that the Indictment is a mere accusation and is not in itself any evidence of the Defendant's guilt. Each allegation therein is a material allegation.

The defendant has pleaded not guilty to the matters set forth in said Indictment. That plea puts in issue every material allegation of the Indictment and puts the burden of proof upon the plaintiff to prove every such allegation beyond a reasonable doubt. The defendant is presumed to be innocent and until the plaintiff has proven every material allegation of said Indictment beyond a reasonable doubt, the defendant is entitled to the continued benefit of the presumption of his innocence.

(c) The jury is instructed that if the evidence in this case proves each of the allegations of said Indictment beyond [115] a reasonable doubt, the jury should find the defendant guilty of the crime charged in the Indictment herein. If, on the other hand, a single material allegation of said Indictment is not proved beyond a reasonable doubt, the jury should find the defendant not guilty of the crime set forth in the Indictment.

2.

You are instructed that, as used with reference to the case now on trial:

The word "wilfully" means intentionally and de-

liberately, and implies knowledge on the part of the wrongdoer.

The word "unlawfully" means forbidden by law.

The word "feloniously" means the unlawful doing of an act which may be punished by imprisonment in the penitentiary, such as the crime charged in this case. The word "unlawfully" is included in the word "feloniously."

3.

In regard to the term "reasonable doubt," as used in these instructions and as defined by law, you are instructed as follows:

(a) If, after considering all of the evidence in the case, there is in the minds of the jury a fixed conviction that the defendant is guilty and that conviction arises out of the evidence in the case, the jury would be justified in considering that there is no reasonable doubt in the minds of the jury in the sense in which the term is used in law. [116]

(b) A doubt, to be such a reasonable doubt, must be actual and substantial and not a mere fanciful speculation. It cannot be a reasonable doubt if it ignores a reasonable interpretation of the evidence or lack of evidence within the power of a party to produce or arises merely from sympathy or a vague fear. The rule of law as to a reasonable doubt is a practical rule for the guidance of practical jurors when engaged in the solemn duty of assisting in the administration of justice and is not whimsical or fanciful. A mere possibility of error or mistake does not constitute a reasonable doubt. Despite every precaution that may be taken to prevent it, there may

be in most human affairs a mere possibility of error. A doubt, to be a reasonable one, must have a real substantial basis and not be mere fancy or conjecture. It must be such a doubt as would give rise to grave uncertainty and make the juror feel that he did not have an abiding conviction of the Defendant's guilt. To prove a proposition beyond a reasonable doubt, the evidence or lack of evidence must be such that it would convince a prudent man of its truth to such a degree of certainty that he would feel like acting upon such conviction in matters of the highest importance to his own personal interests.

4.

The jury is instructed that they should bring to bear upon the consideration of the evidence or lack of evidence in this [117] case all of the common knowledge of men and affairs which they, as reasonable human beings, have and exercise in everyday affairs of life. Accordingly, you should draw from the evidence or lack of evidence in this case all deductions which appear to you to flow logically from the evidence or lack of evidence. Whatever verdict is warranted by the evidence under the instructions of the Court, you should return as you have sworn to do.

5.

You are instructed that a person charged with the commission of a crime shall at his own request, but not otherwise, be deemed a competent witness in his own behalf—the credit to be given to his testimony being left solely to the jury under the instructions of the Court.

You are instructed that in this case the credit to be given to the testimony of the defendant, who has voluntarily offered himself as a witness and testified in his own behalf, is left solely to you and you should give it the same fair and candid consideration as you do the testimony of other witnesses in the case, but you have a right to take into consideration the interest of the defendant in the result of the trial as affecting his credibility.

6.

In determining the credit you will give to a witness and the weight and value you will attach to his testimony you [118] should take into account the conduct and appearance of the witness upon the stand; the interest he has, if any, in the result of the trial; the motive he has in testifying, if any is shown; his relation to or feeling for or against any of the parties to the cause; the probability or improbability of his statements; the opportunity he had to observe and to be informed and the inclination he evinced to speak the truth or otherwise as to matters within his knowledge. It is your duty to give to the testimony of each and every witness appearing before you such credit as you consider the same justly entitled to receive.

You are further instructed that in your consideration of the evidence in this case you should analyze it in the light of the knowledge which your experience in life has given you, and you should draw from the evidence all logical and natural deductions and be governed accordingly.

7.

You are instructed as follows:

1. That you should not consider any evidence sought to be introduced, but excluded by the court, nor should you consider any evidence that has been stricken from the record by the court;

2. That it is manifestly impossible for the court to cover the law of this case in a few instructions and that, therefore, you should consider all the instructions together [119] and not disconnectedly;

3. That wherever in these instructions the masculine is used, it shall be deemed to include the feminine, unless the context shows it to be inapplicable.

4. That you should endeavor to agree upon a verdict and should calmly reason with your fellows with the view of arriving at a verdict. You should not refuse to agree from pride of opinion, nor should you surrender any conscientious views founded on the evidence or lack of evidence.

5. That wherever in these instructions the singular is used, it shall be deemed to include the plural, unless the context shows it to be inapplicable.

8.

You are instructed that the laws of the Territory of Alaska lay down the following general rules for your guidance as to the value of evidence, to wit:

1. That you are not bound to find in conformity with the declarations of any number of witnesses which do not produce conviction in your minds against a less number, or against a presumption or other evidence satisfying to your minds.

2. That a witness wilfully false in one part of his testimony may be distrusted in others.

3. That evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which [120] it is in the power of one side to produce and of the other to contradict; and, therefore,

4. That if the weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party, the evidence offered should be viewed with distrust.

5. That oral admissions of a party should be viewed with caution.

9.

Except where the Court declares the evidence to be conclusive, you, members of the jury, are the judges of the value of all of the evidence admitted in the case. However, your power of judging the effect of evidence is not arbitrary, but must be exercised with legal discretion and in subordination to the rule of evidence as administered by and given to you by the Court in its Instructions.

You should not permit the remarks or expressions of opinion by the attorneys in the case to influence your judgment unless the same are in conformity with the evidence or are logical deductions therefrom.

Your duty is to determine the facts of the case from the evidence submitted in conformity with the Instructions of the Court.

It is the duty of the Judge of this Court to in-

struct you as to the law involved in this case and it is your duty, [121] as jurors, to accept as law and to follow the same, whatever is laid down to you as the law of the case by the Judge of this Court.

10.

Pursuant to the foregoing instructions I have prepared two forms of verdict. The first form finds the defendant not guilty of the crime charged in the Indictment. The second form of verdict finds the defendant guilty of the crime of attempting to obtain money by false token with intent to defraud as set forth in the Indictment herein.

Upon retiring to your jury room you should elect a foreman and by him or her sign the verdict upon which you unanimously agree.

Herewith I hand you these instructions for your guidance, together with the exhibits that have been introduced in evidence, the Indictment in the case, and the forms of verdict above mentioned. Return all of these and the unused form of verdict into Court with your verdict.

Dated at Fairbanks, Alaska, this 27th day of February, 1952.

/s/ HARRY E. PRATT,
District Judge.

The Court: The attorneys may come forward at this time.

(Counsel approached the bench and the following ensued):

Mr. Hurley: The defendant excepts to instruc-

tion 1(c), [122] for the reason that said instruction informs the jury that the Government must prove each of the material allegations of the Indictment beyond a reasonable doubt but fails to state what the material allegations of the Indictment are, and it leaves the jury in doubt as to what was necessary to be proven. In view of the argument of the District Attorney, the jury might well return a verdict of guilty on the mere fact that they believed a false token had been repared, even though they had a reasonable doubt as to whether or not an attempt was made to secure money as charged in the Indictment.

Mr. Hepp: I oppose that.

The Court: I will overrule that.

Mr. Hurley: I renew my exception to the Court's refusal to give the three requested instructions which were requested by the defendant.

Mr. Hepp: I couldn't find in the instructions what Your Honor had stated that you had covered, as the substance of plaintiff's instruction No. 1, in your instructions. I fail to find it.

The Court: It was in the first instruction.

Mr. Hepp: I will withdraw it, then.

(The discussion at the bench was concluded.)

The Court: The jury may retire in the custody of the bailiffs.

(At 12:15 p.m., the jury, in charge of its sworn bailiffs, retired to enter upon its deliberations.) [123]

(Thereupon, at 2:45 p.m., court was reconvened in the aforementioned cause.)

The Court: Call the roll of the jury.

(Whereupon the Clerk of Court proceeded to call the roll.)

The Clerk: They are all present, Your Honor.

The Court: Have you arrived at a verdict, ladies and gentlemen of the jury?

The Foreman: Yes, Your Honor.

The Court: Give it to the bailiff for the Court, please. The verdict may be read and filed.

(The Clerk of the Court read the verdict as follows):

[Title of District Court and Cause.]

VERDICT No. 2

We, the jury duly empaneled and sworn to try the above-entitled cause, do from the law and the evidence therein find the defendant, Ralph G. Lemke, guilty of the crime of attempting to obtain money by false token with intent to defraud as set forth in the Indictment herein.

Done at Fairbanks, Alaska, this 27th day of February, 1952.

/s/ JEWELL BOSWELL,
Foreman.

Certificate of Reporter attached.

[Endorsed]: Filed March 24, 1952.

[Endorsed]: No. 13342. United States Court of Appeals for the Ninth Circuit. Ralph G. Lemke, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the District Court for the District of Alaska, Fourth Division.

Filed April 14, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit

No. 13342

RALPH G. LEMKE,

Appellant,

vs

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S STATEMENT OF POINTS AND DESIGNATION OF RECORD

Comes Now, the appellant above named, by his attorney, Julien A. Hurley, and respectfully requests and designates the entire record including all of the testimony to be printed for submission to the Court in the above entitled criminal action.

The points to be relied upon by the Appellant are as follows:

1. Errors of the Court in admitting evidence of-

fered by appellee which was objected to by appellant and admitted over the objections of appellant which evidence was incompetent, irrelevant and immaterial and prejudicial to the rights of appellant.

2. Error of the court in overruling appellant's motion to dismiss the indictment.

3. Error of the Court in denying appellant's motion for an instructed verdict.

4. Error of the court in refusing to give the instructions requested by the appellant.

5. Error of the court in refusing to instruct the jury as to what constituted the material allegations of the indictment.

That the points relied upon will be more fully defined and set forth in appellant's brief.

/s/ JULIEN A. HURLEY,
Attorney for Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed April 14, 1952. Paul P. O'Brien, Clerk.

No. 13342

United States
Court of Appeals
for the Ninth Circuit.

RALPH G. LEMKE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Supplemental
Transcript of Record

Appeal from the District Court
for the District of Alaska,
Fourth Division

In the District Court for the District of Alaska,
Fourth Division

General June, 1951, Term Monday, March 10, 1952

98th Court Day

Court convened pursuant to adjournment at 1:45 p.m., Honorable Harry E. Pratt, District Judge, present and presiding. Also present were Everett W. Hepp, United States Attorney, and John B. Hall, Clerk. The following proceedings were had, to wit:

No. 1578 Cr.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RALPH G. LEMKE,

Defendant.

SENTENCE

Came Everett W. Hepp, U. S. Attorney, representing the Government; came the defendant in person and represented by Julien A. Hurley.

This being the time set for the passing of sentence in this cause, the Court asked Mr. Hepp, Mr. Hurley, and the defendant if either had anything to say.

Mr. Hepp and Mr. Hurley presented statements to the Court.

The Court announced that the sentence would be confinement in the U. S. Jail at Fairbanks, Alaska, for the period of six (6) months.

The Court stated that the amount of the Stay Bond in this cause would be Two Thousand Dollars ($2,000.00), and that the present bond of One Thousand Dollars be continued until 2:00 p.m., Wednesday, March 12, 1952, at which the Stay Bond must be filed.

Acceptance of service of the Certified Copy of Sentence is hereby admitted by receipt of a copy thereof.

/s/ R. J. McNEALY,
United States Attorney, Fourth Judicial Division,
Territory of Alaska.

In the District Court of the District of Alaska,
Fourth Judicial Division

CERTIFICATE

United States of America,
District of Alaska, Fourth Judicial Division—ss.

I, John B. Hall, Clerk of the District Court of the District of Alaska, Fourth Judicial Division, hereby certify that the foregoing and hereto attached one page(s) of typewritten matter, constitute(s) a full, true, and complete copy, and the whole thereof, of the sentence in cause No. 1587 Cr., entitled, United States of America, Plaintiff, vs. Ralph G. Lemke, Defendant.

In Witness Whereof I have hereunto set my

hand and the seal of the above-entitled Court this 20th day of April, 1953.

[Seal] JOHN B. HALL,
Clerk.

By /s/ AUDREY E. WARFIELD,
Deputy.

AFFIDAVIT

United States of America,
Fourth Judicial Division,
Territory of Alaska.

Julien A. Hurley, being first duly sworn, upon oath deposes and says:

That on the 10th day of March, 1952, sentence was imposed upon Ralph G. Lemke, Defendant, in Case No. 1578 Criminal, entitled United States of America, Plaintiff, vs. Ralph G. Lemke, Defendant.

That after sentence was passed and in the presence of the Court and the United States Attorney, I gave Notice of Appeal in open Court and asked the Judge to fix the amount of a stay bond and told him that I would file the Notice of Appeal and Undertaking as soon as I could prepare them.

That the Court gave me until 2 p.m. Wednesday, March 12, 1952, in which to file the bond and I assumed that the judgment had been entered on the day sentence was imposed and I am of the opinion that the Court, when he approved the bond, was under the impression that the judgment had been entered.

That the Defendant was then released under the pending bond until 2 o'clock p.m., March 12, 1952.

/s/ JULIEN A. HURLEY.

Subscribed and sworn to before me this 22nd day of April, 1953.

[Seal] /s/ E. P. McCARRON,
Notary Public in and for the
Territory of Alaska.

My commission expires 4/5/'56.

Acceptance of service of the foregoing Affidavit is hereby admitted by receipt of a copy thereof.

/s/ R. J. McNEALY,
United States Attorney.

Received April 24, 1953.

PAUL P. O'BRIEN,
Clerk.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK AS TO DOCKET ENTRIES

I, John B. Hall, Clerk of the District Court, Fourth Judicial Division, Alaska, do hereby certify that the following list comprises all docket entries in the above-entitled cause, to wit:

1952

Jan. 7—File Indictment, A True Bill.

Feb. 13—Issue Bench Warrant.

1952

Feb. 14—File Bench Warrant, served, bail at $1,000.00.

Feb. 18—File Arraignment and Setting Time to plead, 43/77.

Feb. 19—File Motion to dismiss.

Feb. 20—File Praecipe for Subpoena—Govt. (5)

Feb. 20—Issue Subpoenas—Govt. (5).

Feb. 19—File and enter Order, Plea, and Setting for Trial, 43/80.

Feb. 26—File and enter Trial by Jury, 43/90.

Feb. 26—File and enter Trial by Jury (Cont.), 43/91.

Feb. 27—File and enter Trial by Jury (Cont.), 43/92-93 (2).

Feb. 27—File and enter Verdict, No. 2, 43/93.

Feb. 27—File Instructions to the Jury.

Feb. 27—File Pltf.'s Instruction No. 1.

Feb. 27—File Instructions requested by Defdt.

Mar. 7—File and enter Time for Sentence, 43/110.

Mar. 10—File and enter Sentence, 43/114 (6 mos. Fed. Jail).

Mar. 11—File Notice of Appeal.

Mar. 12—File Undertaking on Appeal on Admission to Bail.

Mar. 14—File and enter Judgment and Commitment (6 mos.), 43/125.

Mar. 14—Issue 2 ctfd. copies of above to U. S. Marshal.

Apr. 8—File Cost Bill, $34.50.

Apr. 10—File Praecipe for Transcript of Record.

The above is submitted as a supplemental record per an order from the Appellate Court dated March 11, 1953.

Witness my hand and the seal of this Court this 14th day of March, 1953.

Attest:

[Seal] /s/ JOHN B. HALL,
Clerk of Court.

[Endorsed]: No. 13,342. United States Court of Appeals for the Ninth Circuit. Ralph C. Lemke, Appellant, vs. United States of America, Appellee. Supplemental Transcript of Record. Appeal from the District Court for the Territory of Alaska, Fourth Division.

Filed March 19, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

No. 13342

United States
Court of Appeals
For the Ninth Circuit

RALPH G. LEMKE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

**Appeal from the District Court
for the District of Alaska,
Fourth Division**

**Proceedings Had in the United States Court of Appeals
for the Ninth Circuit**

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

United States Court of Appeals
for the Ninth Circuit

[Title of Cause.]

Excerpt from Proceedings of Tuesday, January 27, 1953.

Before: Mathews, Bone and Pope,
Circuit Judges.

ORDER SUBMITTING CAUSE

This cause coming on regularly for hearing or submission, and there being no appearance in open Court on behalf of appellant, on motion of Mr. Robert J. McNealy, United States Attorney, counsel for appellee, Ordered appeal herein submitted to the Court for consideration and decision on briefs on file.

United States Court of Appeals
for the Ninth Circuit
No. 13,342

RALPH G. LEMKE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

ORDER

The Clerk of the District Court for the Territory of Alaska, Fourth Division, is hereby ordered to certify and transmit to the clerk of this Court a

supplemental record on appeal in this case (No. 1578 in the District Court). The supplemental record shall contain:

1. The original or a copy of all docket entries relating to this case. Such original or copy shall clearly indicate the date on which each such docket entry was made.

2. The original or a copy of the court reporter's transcript of all proceedings had in this case after February 27, 1952.

3. The original or a copy of all orders signed by the District Judge and filed in this case before March 14, 1952, with endorsements showing the date of filing each such order. If there was no such order, the clerk of the District Court shall so state.

4. The original or a copy of all judgments signed by the District Judge and filed in this case before March 15, 1952, with endorsements showing the date of filing each such judgment. If there was no such judgment, the clerk of the District Court shall so state.

Upon the filing of the supplemental record with the clerk of this Court, this case shall be deemed submitted to this Court. The submission thereof on February 27, 1953, is hereby vacated.

/s/ CLIFTON MATHEWS,
/s/ HOMER T. BONE,
/s/ WALTER L. POPE,
United States Circuit Judges.

United States Court of Appeals
for the Ninth Circuit

No. 13,342

RALPH G. LEMKE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

March 31, 1953

Appeal from the District Court for the Territory of Alaska, Fourth Division

Before: Mathews, Bone and Pope,
Circuit Judges.

PER CURIAM

Appellant, Ralph G. Lemke, was indicted for violating Alaska Compiled Laws Annotated, 1949, § 65-5-81, was arraigned, pleaded not guilty, was tried and, on February 27, 1952, was found guilty. A judgment sentencing appellant was entered on March 14, 1952. From that judgment—the only judgment entered in the case—no appeal was taken. However, on March 11, 1952, three days before the judgment was entered, appellant took what purported to be an appeal from a judgment entered on March 10, 1952. There was no such judgment. Therefore the appeal is dismissed. Cf. Prickett v. Consolidated Liquidating Corp., 9 Cir., 180 F. 2d 8.

Pope, Circuit Judge, dissenting:

The judgment here discloses that on March 10, 1952, defendant appeared with his counsel for sentence. It is apparent that at that time sentence was pronounced, to commence on that date.[1] However, the judgment was not signed, dated or entered until March 14. It follows from Criminal Rule 32(b) that the notice of appeal, filed March 11, was premature.

But the notice was still on file on March 14, and there is no doubt or uncertainty as to what sentence, or judgment, it was intended to reach. For reasons similar to those suggested in Luckenbach SS. Co. v. United States, 272 U. S. 533, I think we should hold that the notice of appeal, though premature, was not a nullity. See the dictum in Richards v. United States, D.C. cir., 192 F. 2d 602, 604. I think the defect and irregularity here is of the sort we are required to disregard by Criminal Rule 52(a).

[Endorsed]: Opinion and Dissenting Opinion. Filed March 31, 1953. Paul P. O'Brien, Clerk.

---

[1]The judgment reads in part: "On this 10th day of March, 1952, came the Attorney for the Government and the defendant appeared in person and by counsel; It Is Adjudged that the defendant has been convicted on a verdict of guilty. * * * It Is Adjudged: That the defendant is guilty as charged * * * and that he be confined in the Federal Jail at Fairbanks, Alaska, for a period of six (6) months, such sentence to commence on the 10th day of March, 1952: * * *"

United States Court of Appeals
for the Ninth Circuit

[Title of Cause.]

Excerpt from Proceedings of Thursday, March 19, 1953.

Before: Mathews, Bone and Pope,
Circuit Judges.

ORDER RESUBMITTING CAUSE

The certified supplemental transcript of record having been filed, It Is Ordered that this cause be resubmitted to the Court for consideration and decision.

United States Court of Appeals
for the Ninth Circuit

[Title of Cause.]

Excerpt from Proceedings of Tuesday, March 31, 1953.

Before: Mathews, Bone and Pope,
Circuit Judges.

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT

Ordered that the typewritten opinion this day rendered in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this Court in accordance with the opinion rendered.

United States Court of Appeals
for the Ninth Circuit

No. 13,342

RALPH G. LEMKE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

JUDGMENT

Appeal from the District Court for the Territory of Alaska, Fourth Division.

This Cause came on to be heard on the Transcript of the Record from the District Court for the Territory of Alaska, Fourth Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the appeal in this Cause be, and hereby is dismissed.

Filed and entered March 31, 1953.

United States Court of Appeals
for the Ninth Circuit

[Title of Cause.]

Excerpt from Proceedings of Thursday, May 14, 1953.

Before: Mathews, Bone and Pope,
Circuit Judges.

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of Mathews and Bone, Circuit Judges, It Is Ordered that the petition of appellant, filed April 28, 1953, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is, denied.

United States Court of Appeals
for the Ninth Circuit

CERTIFICATE OF CLERK, U. S. COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

I, Paul P. O'Brien, as Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify the foregoing 133 pages, numbered from and including 1 to and including 133, to be a full, true and correct copy of the entire record, excluding original exhibits, of the above-entitled case in the said Court of Appeals, made pursuant to request of counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 4th day of June, 1953.

[Seal] PAUL P. O'BRIEN,
Clerk.

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FILED
JUN 8 1953
HAROLD B. WILLEY, Clerk

In the Supreme Court

OF THE

United States

OCTOBER TERM, ~~1952~~ 1953

No. ~~851~~ 109

RALPH G. LEMKE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

BAILEY E. BELL,
213 Central Building, Anchorage, Alaska;
Attorney for Petitioner.

JULIEN A. HURLEY,
Fairbanks, Alaska,
Of Counsel.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1952

No.

RALPH G. LEMKE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The above-named petitioner respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the

Ninth Circuit, entered in the above entitled cause, dismissing the appeal of petitioner, Ralph G. Lemke, which was entered in said Court of Appeals in Cause No. 13,342, March 31, 1953, and from the order of said Court of Appeals denying petitioner's petition for a rehearing.

JURISDICTION.

The judgment of the Court of Appeals dismissing the appeal of petitioner was entered on the 31st day of March, 1953, and has not yet been reported. A petition for rehearing was denied on the 14th day of May, 1953. Jurisdiction of this Court is invoked under Section 1254 and 2101 of the Judicial Code (Act of June 25, 1948, c. 646, secs. 1254, 2101; 62 Stat. 928, 961; 28 U.S.C. 1254, 2101), and Rule 37(b)(2) of the Federal Rules of Criminal Procedure.

FEDERAL RULES OF CRIMINAL PROCEDURE INVOLVED.

Rule 32(b) and Rule 52(a) of the Federal Rules of Criminal Procedure are involved in this case.

STATEMENT OF THE CASE.

Petitioner, Ralph G. Lemke, was convicted of the crime of attempting to obtain money by false pretenses, in violation of Section 65-5-81, Alaska Compiled Laws Annotated, 1949, and was found guilty on the 27th day of February, 1952. On the 10th day of March, 1952, petitioner was sentenced to serve six months in the Federal Jail at Fairbanks, Alaska, the sentence to commence on the 10th day of March, 1952. The certified copy of the entry of sentence was filed in the Court of Appeals together with petitioner's petition for rehearing.

A notice and undertaking of appeal was filed by petitioner in the District Court for the Territory of Alaska, Fourth Division, on the 11th day of March, 1952, but the United States Attorney failed to prepare the formal judgment of conviction until the 14th day of March, 1952, and the appeal was dismissed because the Appellate Court held that the filing of the notice of appeal was premature.

The Circuit Judge Pope dissented from the opinion of the Court and held that for reasons similar to those suggested in *Luckenbach S.S. Co. v. United States*, 272 U.S. 533, that he thought that the Court should hold that the notice of appeal, though premature, was not a nullity, and that he thought that the defect and irregularity was of the sort to be disregarded under said Criminal Rule 52(a). No motion to dismiss the appeal was served or filed by the United States Attorney for the Fourth Division of the Territory of Alaska.

REASONS FOR GRANTING THE WRIT.

IN DISMISSING THE APPEAL, THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT AND OF A COURT OF APPEALS IN ANOTHER CIRCUIT ON AN IMPORTANT QUESTION OF FEDERAL LAW.

In the case of *Richards v. United States,* 192 Fed. 2d p. 604, we quote the Court as follows:

> "We do not need to decide in this case whether, if a defendant takes an appeal immediately after being sentenced but before entry of judgment of conviction, his appeal is effectively taken. We think it proper to note, however, that there is authority for the proposition that his appeal so taken is not a nullity, but becomes fully effective upon subsequent entry of judgment.".

See:

Luckenbach S. S. Co. v. United States, 272 U.S. 533, 535, 47 S. Ct. 186, 71 L. Ed. 394;

Woods v. Nichols, 10 Cir., 163 F. 2d 615;

Porter v. Borden's Dairy Delivery Co., 9 Cir., 156 F. 2d 798.

Compare:

Silsby v. Foote, 20 How. 290, 295, 61 U.S. 290, 15 L. Ed. 822;

Berman v. United States, 302 U.S. 211, 212, 58 S. Ct. 164, 82 L. Ed. 204.

In the case of *Berman v. United States,* 302 U.S., p. 212, the Court makes the following statement:

> "Final judgment in a criminal case means sentence. The sentence is the judgment."

Miller v. Aderhold, 228 U.S. 206, 210;

Hill v. Wampler, 298 U.S. 460, 464.

In the case of *Porter, Administrator, Office of Price Administration v. Borden's Dairy Delivery Company,* 156 F. 2d 798, Ninth Circuit, the Court held:

> "The Notice of Appeal filed March 15, 1946, is from the final judgment entered in this action on January 29, 1946."

On January 29, findings were filed and entered. It was not until the next day, January 30, that judgment was entered. We are of the opinion that since the notice of appeal is addressed to the final judgment that the mistake of a day in the designation of the date of its entry is immaterial and that the appeal is well taken.

Martin v. Clarke, 7 Cir., 105 F. 2d 685, 124 A.L.R. 497;

Shannon v. Retail Clerk's International P. Ass'n., 7 Cir., 128 F. 2d 553,

and

Wilson v. Southern Ry. Co., 5 Cir., 147 F. 2d 165.

In the case of *Prickett, et al. v. Consolidated Liquidating Corporation,* 180 F. 2d p. 8, Ninth Circuit, no final judgment had been entered and the action was still pending in the District Court at the time the case was heard upon appeal, and is the only case cited in the opinion of the Appellate Court in support of the judgment dismissing the appeal.

The judgment and commitment in this case No. 1578-Cr. was not entered until the 14th day of March, 1952, but the notice of appeal filed on the 11th day

of March, 1952, was in Case No. 1578-Cr., and there was only one criminal case No. 1578, so there could be no question in regard to the sentence and judgment from which the appeal was taken.

To deprive the petitioner and defendant in this action of his right to appeal on account of a defect or irregularity and a mistake by his attorney in no way protects any substantial right of the government.

Under said Rule 52(a), all errors, defects, irregularities or variances which do not affect substantial rights should be disregarded and is a restatement of pre-existing law.

It was the contention of petitioner that the indictment in this case failed to state facts sufficient to constitute a crime; that the Court erred in refusing to instruct the jury to return a verdict of not guilty on account of the insufficiency of evidence; and that the Court erred in refusing to give requested instructions to which he was entitled under the law.

It would be a harsh rule indeed to deprive a defendant of his right of appeal and thereby convict him of a crime based upon an indictment which fails to state facts sufficient to constitute a crime.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Dated, at Anchorage, Alaska, this 29th day of May, 1953.

Respectfully submitted,

BAILEY E. BELL,

Attorney for Petitioner.

JULIEN A. HURLEY,

Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

[illegible] STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 109

RALPH G. LEMKE, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The majority and dissenting opinions of the Court of Appeals (R. 129-130) are reported at 203 F. 2d 406.

JURISDICTION

The judgment of the Court of Appeals was entered on March 31, 1953, and the petition for rehearing was denied on May 14, 1953 (R. 132-

133). The petition for a writ of certiorari was filed on June 8, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Whether the Court of Appeals properly dismissed as premature an appeal taken from a sentence imposed in open court, instead of from the formal judgment of sentence and commitment, which was not filed until several days later.

STATUTE AND RULES INVOLVED

Section 65-5-81, Alaska Compiled Laws Annotated, 1949, provides:

> That if any person shall * * * by any * * * false token, and with intent to defraud, obtain, or attempt to obtain, from any other person any money or property whatever * * * such person, upon conviction thereof, shall be punished by imprisonment in the penitentiary not less than one nor more than five years. * * *

Rule 32(b), F. R. Crim. P.:

> *Judgment.* A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. * * * The judgment shall be signed by the judge and entered by the clerk.

Rule 37(a)(2), F. R. Crim. P.:

> *Time for Taking Appeal.* An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from * * *.

STATEMENT

Petitioner was charged under a one-count indictment in the Fourth Judicial Division of the Territory of Alaska with violation of Section 65-5-81, Alaska Compiled Laws Annotated, 1949 (*supra*, p. 2), by feloniously attempting to obtain money from the Civilian Mess at Ladd Air Force Base, Alaska, by false token and with intent to defraud, in that petitioner, as the authorized agent of the mess, signed and presented for payment receipts for $60 in merchandise, which petitioner knew had not been received. The indictment charged that it was prearranged that the $60 when paid would be divided, $20 for the alleged seller and $40 for petitioner. (R. 1.)

After a jury finding of guilty (R. 5) petitioner on March 10, 1952, was sentenced to six months in jail, and given until 2 p.m. on March 12 to file a stay bond for $2,000 (R. 119-120, 123). Petitioner's counsel asserts in an affidavit that he gave notice of appeal in open court on March 10; that he assumed that the judgment had been entered on that date when sentence was imposed; and that he was of the opinion that the court, when approving the stay bond, was under the impression that

the judgment had been entered (R. 121). On March 11 petitioner filed his notice of appeal from the sentence of March 10 (R. 8-9, 123). On March 12 the required $2,000 stay bond was filed (R. 9-11, 123). On March 14 the judgment and commitment reciting the sentence of March 10 was filed and entered (R. 6-8, 123).

The court below dismissed the appeal as premature since the only judgment sentencing petitioner was entered on March 14, 1952, and no appeal was taken from this judgment. One judge dissenting thought that the notice of appeal, though premature, was not a nullity and that the irregularity should be disregarded under Rule 52(a), F. R. Crim. P. (R. 129-132.)

The evidence adduced by the Government at the trial below may be summarized[1] briefly as follows:

Petitioner, the manager of the Civilian Mess at the Ladd Air Force Base, purchased food from various persons, one of whom was a farmer, Elbert. The procedure followed was for petitioner to sign the invoices for food purchased and present them to the bookkeeper for the mess accounts, after which the bookkeeper would check the invoices for accuracy, enter them, and pay the amounts due by check. (R. 58, 62-63.)

[1] We summarize the evidence since we think that, even though the court below did not reach a consideration of the merits, the dismissal may also be sustained on the ground that the appeal was frivolous. See pp. 8-10, *infra*.

On or about October 9, 1951, petitioner approached Elbert with a proposition for him to make out a false bill for $60 for food not to be delivered, Elbert to retain $20 after payment was made and petitioner to receive $40 (R. 23). Elbert reported the incident to the Air Force Office of Special Investigation (O.S.I.) on October 10, and executed a false invoice for $60 worth of cabbage, which was initialed by O.S.I. officials (R. 23, 25, 26, 42-43, 51). When Elbert approached petitioner with the $60 invoice, petitioner suggested three $20 invoices instead. Accordingly, Elbert executed two invoices of $20 each for cabbage and one of $20 for celery, and petitioner signed them even though he knew the food had not been delivered. (R. 26, 28-30, 47-48, 52.) Since the O.S.I. officials were aware of petitioner's attempted fraudulent scheme, the bookkeeper on orders from his superiors did not make payments on the invoices (R. 64-65).

Petitioner, testifying on his own behalf, categorically denied any deal to cheat the mess of $60 for produce never delivered (R. 87). He denied ever seeing the $60 invoice which Elbert testified he had originally presented to petitioner before three $20 invoices were executed instead (R. 88, 99). He admitted his signatures on the three invoices, but stated that as far as he knew the produce had been received (R. 90-93).

The trial court refused to give two requested in-

structions by petitioner to the effect that a conviction cannot be had upon the uncorroborated testimony of an accomplice, and that testimony of an accomplice is to be viewed with distrust, on the ground that Elbert was clearly not an accomplice (R. 11-12, 84, 103). The court refused to give a third requested instruction to the effect that to justify a conviction there had to be an actual attempt by petitioner or Elbert to obtain money by means of a false token, on the ground that this had already been covered in the court's first instruction (R. 12, 103, 104-105).

ARGUMENT

1. There was no dispute in the court below and there can be no doubt as to the correctness of the ruling that petitioner's appeal was technically premature. Rule 32(b), F. R. Crim. P., provides that a "judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence," and that it "shall be signed by the judge and entered by the clerk." In the instant case while sentence was imposed upon petitioner on March 10, 1952, it was not until March 14 that the formal signed judgment and commitment reciting the sentence of March 10 was filed and entered (R. 6-8, 123). Since there was no judgment of March 10 from which the purported appeal was taken on March 11, the appeal was premature. Cf. *Prickett* v. *Consolidated Liquidating Corp.*, 189 F. 2d 8 (C.A. 9); *Uhl* v. *Dalton*, 151 F.

2d 502 (C.A. 9). See also *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 177; *Reconstruction Finance Corp.* v. *Mouat*, 184 F. 2d 44, 48 (C.A. 9); *Healy* v. *Pennsylvania Railroad Co.*, 181 F. 2d 934 (C.A. 3).

Since, therefore, it is clear that the notice of appeal was defective, petitioner was not entitled to have his appeal considered on the merits as of right. It may be, as the dissenting judge below thought, that the court of appeals, in the exercise of its discretion, had the power to disregard the particular technical error here involved. However, its exercise of discretion not to do so—involving as it does a matter of the appellate court's control of the procedure before it—does not present an issue for review by this Court. It was clearly within the power of the court to require strict compliance with the applicable Rules.[2]

Luckenbach S.S. Co. v. *United States*, 272 U.S. 533, 535, a civil case, upon which petitioner and the dissenting opinion rely, is not controlling. There the appeal was taken after a formal judg-

[2] It is true that a mistake of petitioner's counsel in filing his notice of appeal before the formal judgment of sentence caused the dismissal of the appeal. It would also have been a mistake of counsel if he had not filed his notice of appeal until after the expiration of 10 days from the date of the judgment under Rule 37(a)(2), F. R. Crim. P., but in such a case the court would have been required to dismiss the appeal. Cf. *Marion* v. *United States*, 171 F. 2d 185, 186 (C.A. 9); *Swihart* v. *United States*, 169 F. 2d 808 (C.A. 10); *United States* v. *Bloom*, 164 F. 2d 556, 557 (C.A. 2). The two situations are not essentially different.

ment had been entered but before a motion for a new trial was decided. Here, there was no judgment from which the appeal could be taken at the time the notice of appeal was filed. Moreover, in *Luckenbach* after the motion for a new trial was denied the "application for an appeal was then brought to the Court's attention and allowed" (272 U.S. at 535), but there is no showing here that petitioner, after March 14, called the trial court's attention to his notice of appeal requesting that it run to the formal judgment of March 14 instead of to the sentencing of March 10.[3]

2. In any event, the points petitioner urged on appeal (see Pet. 6) are so frivolous that dismissal of the appeal would have been proper on that ground, and further review by this Court is thus not warranted.

Petitioner argues that the trial court erred in refusing to give two instructions to the effect that a conviction cannot be had upon the uncorroborated testimony of an accomplice, and that testimony of an accomplice is to be viewed with distrust (R. 11-12, 103). It is obvious that Elbert was not an accomplice since he had informed the

[3] Also not in point are cases cited by petitioner (see Pet. 4, 5) holding that where a notice of appeal is addressed to an effective final judgment, the date of which is mistakenly designated, the appeal is nevertheless well taken. E.g. *Porter v. Barden's Dairy Delivery Co.*, 156 F. 2d 798 (C.A. 9); *Shannon v. Retail Clerks, etc.*, 128 F. 2d 553, 555-556 (C.A. 7); *Wilson v. Southern Ry. Co.*, 147 F. 2d 165, 166 (C.A. 5). Cf. *Haines v. United States*, 335 U.S. 297.

O.S.I. officials in advance of petitioner's proposed illegal action, and cooperated fully with them in carrying out the venture, which ultimately incriminated petitioner alone. The following observation of the trial court regarding this is manifestly correct (R. 84):

> * * * I don't think that we have the question of an accomplice in this case at all, because Paul Elbert was designedly or very clearly not intending to commit a crime and not doing the acts which would constitute that crime. He had informed the O.S.I. officials, so that anything that he did would not result in the commission of a crime.

Petitioner's other principal contention was that the evidence was insufficient for conviction since there was no proof that either petitioner or his alleged accomplice ever made any attempt to obtain any money as a result of the admitted false token (R. 73-75, 77). However, the evidence disclosed that according to the prevailing custom, after the bookkeeper received the invoices which had been approved and signed by petitioner, there was no further action necessary on petitioner's part as a prerequisite to payment to the seller of the produce. Clearly petitioner had gone as far as he possibly could in his attempt to have payment on the false invoice made to Elbert, with

whom he intended to divide the proceeds. See trial court's comment, R. 84.[4]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

OSCAR H. DAVIS,
Acting Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

JULY, 1953.

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[4] Another frivolous contention was that the indictment failed to state facts sufficient to constitute a crime (Pet. 6). The indictment (R. 1), which followed generally the language of the statute, and apprised petitioner with reasonable certainty of the elements of the offense so that he could prepare his defense thereto and plead the judgment as a bar to any other prosecution for the same offense, was sufficient. See *Hagner* v. *United States*, 285 U.S. 427, 431; *United States* v. *Britton*, 107 U.S. 655, 665; *United States* v. *Simmons*, 96 U.S. 360, 362.